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The Council of Europe and the Death Penalty:
The Relationship of State Sovereignty
and Human Rights

by

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The Council of Europe and the Death Penalty:
The Relationship of State Sovereignty
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Preface and Acknowledgments

Preface

On the evening of 15th October 1979, Glen Burton Ake and Steven Keith Hatch committed a heinous and atrocious crime. They entered the rural Oklahoman residence of the Douglass family, tied up Mr. and Mrs. Richard Douglass and their sixteen year old son, Brookes and attempted to rape their twelve year old daughter, Leslie. After their attempts failed, they tied up the daughter and placed her next to her family. Ake ordered Hatch to go outside and get the car ready and “listen for the sound.”¹ Hatch left the house, turned the car around and then waited. Ake then shot each of the four family members as they lay tied. Mrs. Douglass died instantly, and Mr. Douglass died from a combination of the bullet wound and strangulation by a binding around his neck. Leslie and Brookes survived this horrific event and made their way to a nearby doctor’s house. Ake and Hatch fled from Oklahoma, but they were eventually arrested in Colorado and brought back to the state to stand trial.

The suspects were tried separately. Ake was found guilty at trial and sentenced to death. However, Ake’s mental health was in question, but the trial court denied him a “court appointed psychiatrist” to determine whether he was fit to stand trial. He appealed to the U.S. Supreme Court and it ruled that Ake should have been provided with a psychiatrist to assess his competence. At a re-hearing he was found to be incompetent and his death sentence was commuted.² On the other hand, Hatch, who did not commit murder was found guilty of the two murders and sentenced to forty-

¹ Oral evidence presented at trial. See, *Ake v. State*, 663 P.2d 1(1983)

² *Ake v. Oklahoma*, 470 U.S. 68 (1985).

five years for each crime, and also, the death penalty by lethal injection.³ Seventeen years later, Hatch had lodged numerous appeals which were denied by the Oklahoma Court of Criminal Appeals, the 10th Circuit Court of Appeals, and the U.S. Supreme Court. The Oklahoma Court of Criminal Appeal then set Hatch's execution date for 9th August 1996.⁴

At this time I was a law student from England working as a legal researcher for the public defenders responsible for Hatch's clemency petitions. We filed the arguments for clemency to the State Governor and State Pardon and Parole Board. It was bizarre to me that Ake, who actually killed Mr. and Mrs. Douglass, could not be legally executed, but that the man who sat in the get-away car was about to have his life cut short.⁵ Apart from the blatant fact that Hatch did not commit murder, he had on many occasions stated that he did not know what Ake was going to do. But the State of Oklahoma demanded his death, the judicial system obliged, and the Governor and the Pardon and Parole Board stamped their seal of approval by denying clemency and announced for the execution to proceed.

What Ake and Hatch did was vile, repugnant and inhumane, and no family should ever experience the catastrophic events the Douglass family endured. But it was also detestable for the State of Oklahoma to act in the way it did. Throughout this insidious experience I could not relinquish the feeling that the state should be setting

³ *Hatch v. State*, 662 P.2d 1377 (1983)

⁴ *Hatch v. State*, 924 P.2d 284, 289 (1996). By this time, Brookes Douglass had made a remarkable recovery from the early traumatic events in his life and became a State Senator.

⁵ Upon witnessing an execution in Burma, George Orwell stated, "[i]t is curious, but until that moment I had never realised what it means to destroy a healthy, conscious man. When I saw the prisoner step aside to avoid the puddle, I saw the mystery, the unspeakable wrongness of cutting a life short when it is in full tide," in *A Hanging*, p. 16, George Orwell, *George Orwell: Essays*, (ed, Bernard Crick) (London: Penguin, 2000)

an example which promotes ‘life.’ But all it did was to show that revenge could encompass the repugnant *talion* cry of a life for a life.

The night of the execution I attended a candle-light vigil outside the Oklahoma State Capitol Building with some of the lawyers and local anti-death penalty activists. I was the only non-American (my passport displayed I was a citizen of the United Kingdom of Great Britain, and also, of the European Community). We sat in a circle on the cold marble floor under the large Corinthian style pillars crowned by the tapered pediment, and the conversation was awkward. The light was on in the Governor’s room in the magnificent building. One of the lawyers told me, “when you see that light go out, it means that the prison has called the Governor’s office telling them it is done.” We held candles and the flickering flames danced our shadows around us. I remember watching our silhouettes as a lady gasped and called-out, “he’s gone!” Everyone looked up to see that the light had been switched off. We hugged for a while and tears fell. As the group parted, a lady I did not know came up to me and said, “thank *you* for trying.” Her whispered “*you*” would have been out of place if she had been speaking to a fellow Oklahoman, a fellow ‘Sooner.’ But she had spoken to me as a foreigner, as a British citizen, as a European.

Over the next few days the lawyers in the office and other people, strangers to me, would say it was remarkable that a foreigner would come over and care about American lives, or in the words of one of the lawyers, “come from over the pond to give a damn.” In the end, this sentiment is what I try to hold onto. I can only say that even for all the world’s troubles, I would prefer to begin with caring about life. I want to be part of the promotion of *life* rather than *death*, and I now join the growing

European multitude who feel that they have an ethical and/or legal responsibility to “give a damn.” It is with this sentiment that I embarked upon an investigation not as a European questioning the death penalty in the United States, but, as should always be the first step, wanting to help ensure that the morally, and legally, correct example is given within one’s own “back-yard.”

To this end, this study investigates the processes of the removal of the death penalty within the Council of Europe and its Member States. An evaluation is conducted of the relationship of sovereignty and the death penalty in this region, and the significance of the Council’s attempts to penetrate this relationship is analysed. The foremost motivation of this study is to understand how solid the removal of the death penalty is, and to reveal what can be learned from the legislative activity of the Member States and the various Parliamentary Assembly and Committee of Ministers’ enactments, and the case-law of the European Commission of Human Rights and the European Court of Human Rights. It is my hope that this study will help ensure that the death penalty remains removed from this European region.

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⁶ This book is now in its third edition.

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Abbreviations

Abbreviations

<i>A.J.I.L.</i>	American Journal of International Law
<i>Am. Soc’y Int’l L. Proc</i>	American Society of International Law and Procedure
Assembly	Parliamentary Assembly of the Council of Europe
<i>B.C. Int’l & Comp. L. Rev</i>	Boston College International and Comparative Law Review
<i>B.Y.I.L.</i>	British Yearbook of International Law
<i>Brit. J. Crim</i>	British Journal of Criminology
<i>Brooklyn. J. of Int’l L</i>	Brooklyn Journal of International Law
<i>Cam. L. J.</i>	Cambridge Law Journal
<i>Colum. J. Eur. L</i>	Columbia Journal of European Law
Committee	Committee of Ministers of the Council of Europe
<i>Convention</i>	Convention for the Protection of Human Rights and Fundamental Freedoms (also known as the European Convention of Human Rights)
<i>Cornell Int’l L. J.</i>	Cornell International Law Journal
Council	Council of Europe
<i>Crim. L. Forum</i>	Criminal Law Forum
CSCE	Conference on Security and Co-operation in Europe
<i>E.H.R.L.R.</i>	European Human Rights Law Journal
<i>E.I.L.J.</i>	European International Law Journal
<i>E.L.Rev.</i>	European Law Review
EU	European Union
<i>Geo. J. Int’l L.</i>	Georgetown Journal of International Law

<i>H.R.L.J</i>	Human Rights Law Journal
<i>H.R.L.R.</i>	Human Rights Law Review
<i>Hamline J. Pub. L. & Pol'y</i>	Hamline Journal of Public Law and Policy
<i>Harv. C. R-C. L. L. Rev</i>	Harvard Civil Rights-Civil Liberties Law Review
<i>I.C.L.Q.</i>	The International and Comparative Law Quarterly
<i>Int. L. Q.</i>	International Law Quarterly
<i>J.I.C.J.</i>	Journal of International Criminal Justice
<i>Law & Soc. Rev.</i>	Law and Society Review
<i>Loy. L. A. Int'l & Comp. L. Rev.</i>	Loyola Los Angeles International and Comparative Law Review
<i>Loy. L. Rev</i>	Loyola Law Review
<i>M.J.E.C.L.</i>	Maastricht Journal of European and Comparative Law
NCADP	National Council for the Abolition of the Death Penalty
<i>N.Y.L. Sch. J. Int'l & Comp. L.</i>	New York Law School Journal of International and Comparative Law
OSCE	Organisation for Security and Co-operation in Europe
<i>Ohio. N.U.L.Rev.</i>	Ohio Northern University Law Review
<i>P.L.</i>	Public Law
<i>Pace Int'l L. Rev.</i>	Pace International Law Review
RCCP	The Royal Commission on Capital Punishment
SCCP	The Select Committee on Capital Punishment
<i>St. Louis U. L.J.</i>	St. Louis University Law Journal
<i>Stan. L. Rev.</i>	Stanford Law Review

<i>TP</i>	<i>Travaux Préparatoires of the Convention</i>
<i>U.J.H.R.</i>	The Ukrainian Journal of Human Rights
<i>Uni. Pen. L. Rev</i>	University of Pennsylvania Law Review
<i>U.S.F.L.Rev.</i>	University of San Francisco Law Review
<i>Wm. & Mary Bill Rts. J</i>	William and Mary Bill of Rights Journal
<i>Yale L.J.</i>	Yale Law Journal

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Chapter One: Introduction

1. Introduction

1.1 General Theme of Enquiry

This thesis investigates the remarkable claim that the Council of Europe (hereinafter, “Council”)¹ has established a “death penalty-free area”² within the borders of its Member States. There has not been an execution in this region since 1997,³ and such a position appears to provide a bulwark against the punishment for approximately 800 million inhabitants.⁴ On the surface this suggests nothing short of a penological revolution, as at no other time in the history of Europe has a collective sovereign state pronouncement against the death penalty been witnessed.

European history and political philosophy from Ancient Greece,⁵ the Roman Empire⁶ and the Enlightenment,⁷ through to the nineteenth century,⁸ and continuing right up to

¹ The Council was established under the *Statute of the Council of Europe*, London, 5.V.1949. A complete list of Council of Europe legislation can be found at <http://conventions.coe.int>. The *Statute of the Council of Europe* is numbered “1” in the European Treaty Series. Amendments and texts of a statutory character adopted later have been numbered 6,7,8 and 11.

² Council of Europe, *Death is Not Justice*, (Strasbourg: Council of Europe Publishing, 2007).

³ The last Council Member State to impose an execution was the Ukraine on 11th March 1997, see Chapter Seven below.

⁴ Walter Schwimmer, *Forward*, p. 5, in Council of Europe, *Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

⁵ See, Thucydides, *History of the Peloponnesian War*, (trans: Rex Warner) (London: Penguin, 1972), p. 219; Aristotle, *The Politics*, (trans: T.A. Sinclair) (London: Penguin, 1981), p. 227; Plato, *The Republic*, (trans: Desmond Lee) (London: Penguin, 1987), pp. 355-360.

⁶ Plutarch, *The Lives of the Noble Grecians and Romans*, (Chicago: Encyclopaedia Britannica, 1952), p. 70; Cicero, *Murder Trials*, (trans: Michael Grant) (London: Penguin, 1990), p. 273.

World War Two,⁹ reveals a genealogy of the death penalty as a manifestation of sovereign power over life and death. Intrinsic to this power was the acceptance that European governments had the right to administer the death penalty for criminal offences. Hence, the choice of whether or not to impose the punishment, and the scope of its application, was reserved to the ruling governments from the oligarchs of Ancient Greece, to the nation states of twentieth century Europe.

However, this monolithic history has apparently taken a turn in a manifest way. Since the end of World War Two, when the sovereign's right of the death penalty was most legitimated for Nazi war criminals and their followers, a turning point occurred as European governments gradually turned their backs on the punishment. It is perhaps the unique epoch which Albert Camus hoped would happen as Europe became unified when he stated, "[i]n the unified Europe of the future, the solemn abolition of

⁷ See, Thomas Hobbes, *Leviathan*, (Oxford: Oxford University Press, 1996), p. 141; John Locke, *Second Treatise of Government*, (ed. C.B. Macpherson) (Indianapolis: Hackett Publishing Co. 1980), p. 8; Jean-Jacques Rousseau, *The Social Contract*, in, *The Social Contract and Discourses*, (trans: G.D.H. Cole) (London: Everyman, 2004), p. 209; Cesare Beccaria, *An Essay on Crimes and Punishment*, (Chicago: Brandon Pres, 1983), Chpt. 28.

⁸ See, François Guizot, 'A Treatise on Death Punishments,' in *ibid*, *General History of Civilisation in Europe: From the Fall of the Roman Empire Till the French Revolution*, (Edinburgh: William and Robert Chambers Press, 1848); Jeremy Bentham, *To His Fellow Citizens of France on Death Punishments*, (London: Robert Heward, 1831).

⁹ See, S. Margery Fry, *The Abolition of the Death Penalty in Holland and Scandinavia*, (London: Howard League for Penal Reform, 1925); Arthur Koestler, *Reflections on Hanging*, (London: Gollancz, 1956); Viscount Templewood, *The Shadow of the Gallows: The Case Against Capital Punishment*, (London: Victor Gollancz, 1951).

the death penalty ought to be the first article of the European Code we all hope for.¹⁰ By 1981, Camus's, and many other's hopes, had begun to be realised when Western European states appeared to independently chose to not apply the punishment for ordinary crimes.¹¹

Following this apparent change the Council began to develop a centralised anti-death penalty strategy, which enhanced human rights standards under the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereinafter, "Convention")¹² and in 1983 *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty* (hereinafter, "Protocol No. 6")¹³ was adopted which provides for abolition of the punishment in peacetime, and then in 2002, *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances* (hereinafter, "Protocol No. 13")¹⁴ was adopted which provides for abolition in all circumstances. After 1994, when the Council's membership expanded through Central and Eastern Europe, the process of the removal of the death penalty spread.

¹⁰ Albert Camus, 'Reflections on the Guillotine,' in *ibid*, *Resistance, Rebellion and Death*, (New York: Vintage Books, 1998), p. 182.

¹¹ Belgium was the anomaly which reserved the death penalty within its statutes, but did not apply it as all death sentences were automatically commuted. The death penalty in Belgium was officially abolished in 1996.

¹² CETS No. 005, Rome, 4 November, 1950. Text as modified by Protocol 11.

¹³ CETS No. 114, Strasbourg, 28th April 1983.

¹⁴ CETS No. 187, Vilnius, 3rd May 2002.

This thesis provides a legal history of the genesis of this penological movement and identifies the formulation of human rights mechanisms which appears to have contributed significantly to the dismantling of the punishment across the European region. The starting point is taken to be the creation of the Council in 1949, and the legal genealogy then continues through to April 2008.

Two main subjects of enquiry are juxtaposed throughout the thesis. The first is the changing nature of the sovereign state's "right" of the death penalty. Second is the extent to which the Council's human rights legislation and policies have contributed to this recent sovereign penal decision, and thus possibly influenced the change.

1.2 Lacunae in Current Analysis

One of the key reasons for embarking on this study is that there are identifiable lacunae within the current published literature. Firstly, there is no monograph which critically evaluates the process of abolition within the Council and its Member States. The posthumous publication of Hans Göran Franck, *The Barbaric Punishment: Abolishing the Death Penalty*, which was edited by William Schabas,¹⁵ provides an extremely useful overview of the death penalty in Europe up until 1996, with an analysis of international law and state practice. The book has great value as a general overview of the Council's anti-death penalty strategies. Franck was one of the influential architects of the expansion process of the Council to encompass Central

¹⁵ Hans Göran Franck, *The Barbaric Punishment: Abolishing the Death Penalty*, (ed, William Schabas) (The Hague: Martinus Nijhoff, 2003).

and Eastern European states post 1994, and he stalwartly argued for the requirement that the death penalty should be abolished by new members.

However, Franck's work did not consider a critical reading of the historical, political and philosophical influences which contributed to the removal of the death penalty in this region, and the developments within the Council have gone beyond what was considered. Furthermore, only the main Parliamentary Assembly and Committee of Ministers provisions, including recommendations and resolutions, are provided, but a comprehensive reading of all the enactments was not presented.

Secondly, the available literature provides insufficient investigation into how the death penalty was adopted as an acceptable practice at the creation of the Council. Why was the punishment implicit within the *Statute of the Council of Europe* (hereinafter, the "Statute")?¹⁶ There is also limited information concerning the drafting of the *Convention*. To what extent was the death penalty a matter of the politics of Member States, and not an exclusive question of human rights? This question must involve an analysis of the apparent complete abandonment of the death penalty for ordinary crimes¹⁷ in Western Europe by 1981, before the Council enacted any centralised human rights policies on the punishment. There is a clear absence of scholarship engaging with the relationship of state politics and the anti-death penalty discourse between 1949 and 1981.

¹⁶ See, *Statute*, above, fn. 1.

¹⁷ The term "ordinary crimes" generally refers to crimes which are committed in peacetime. It does not cover crimes such as treason or other offences against the state.

I know of no scholarly articles which critique this specific issue during this period, and the literature which engages with the development of European human rights mostly points to the historical fact of when the Council's policies were formulated, predominately following Carl Lidbom's 1980 report to the Parliamentary Assembly,¹⁸ and through the adoption of *Protocol No. 6* in 1983. This literature is correct in its identification of the change in the prominence of human rights, but it does not explain "why" the changes happened, and what the significance is for the sovereign state's right of the death penalty.¹⁹

There are scholarly articles which focus on municipal processes for application and removal,²⁰ and there was also the British Royal Commission on Capital Punishment

¹⁸ *Report on the abolition of capital punishment*, Doc. 4509, (2nd and 3rd sittings), 22 April 1980.

¹⁹ Perhaps Franklin Zimring's chapter on Europe comes the closest to providing analytical critique when he identifies that no centralised position was created before *Protocol No. 6*. However, he does not engage with the question of what the significance of this finding is for the relationship of sovereignty and the death penalty, see, *The Contradictions of American Capital Punishment*, (New York: Oxford University Press, 2003), p. 27.

²⁰ For example, see the articles on Sweden, Norway, Denmark and Holland in, Fry, above, fn. 9; the various articles which are referred to in this thesis in the Council of Europe, *Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Press, 2004); *ibid*, *the Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Publishing, 1999) Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 4th ed, (Oxford: Oxford University Press, 2008); R. Fawn, 'Death Penalty as Democratization: Is the Council of Europe Hanging Itself?' *Democratization*, vol. 8, No. 2, 75-76 (Summer, 2001) and, Peter Hodgkinson, 'Europe – A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies,' 26 *Ohio. N.U.L. Rev.* 625 (2000).

between 1949-1953, which provided some municipal comparative analysis.²¹ However, there is no literature which seeks to engage the municipal activities with the early life of the Council. As one of the fundamental issues for investigation is the removal of the death penalty before any official Council edicts on the punishment were formulated this study fills a theoretical lacunae.

Thirdly, there has been insufficient scholarly enquiry identifying the significance of the relationship between the Member States' governments and the Committee of Ministers. The Committee is the decision making organ of the Council and it comprises the foreign ministers of the Member States. Under the Statute of the Council of Europe, Article 15 (a), the Committee of Ministers shall "consider the action required to further the aim of the Council of Europe, including the conclusion of conventions and agreements." As such, there is a real potential for the interests of the states to be intricately incorporated within human rights legislation. Indeed, this is a major theme that is explored within Chapters Five to Seven.

The literature does not engage effectively with the Committee of Minister's legislative activity concerning the drafting and adoption of *Protocols No. 6* and *No. 13*. This study has uncovered specific frictions between the Parliamentary Assembly and the Committee of Ministers with regards to the drafting of *Protocols No. 6* and *No. 13*, the amendment of *Convention Article 2(1)*, the prerequisites for membership during expansion post-1994 and the issue of compliance with human rights standards expected of Council observer states. In each case, it is suggested that the underlying cause of the friction, and in some cases, significant disagreements, between the two

²¹ *Report of the Royal Commission on Capital Punishment, 1949-1953*, (London: HMSO, 1953).

Council organs fundamentally concerns the relationship of the sovereignty of nation states with the right of the death penalty. It is proposed that an adequate understanding of this friction within the Council can only be achieved through an investigation into the manifestation of sovereignty within the Council and its Member States. Hitherto, the published scholarship has not undertaken this theoretical task.

Fourthly, a large part of the scholarship analyses the jurisprudence of the European Court of Human Rights (and former European Commission of Human Rights), and predominantly the landmark cases of *Soering v. the United Kingdom*,²² and *Öcalan v. Turkey*.²³ These cases are significant because they both provide interpretations of Articles 2(1) and 3, following the enactment of the two protocols: *Soering* considered

²² *Soering v. the United Kingdom*, Application No. 14038/88, Commission decision, 19 January 1989, and Court decision, 7 July 1989. For a selection of commentaries on the case, see, Richard B. Lillich, 'The Soering Case', 85 *A.J.I.L.* 128 (1991); Ann Sherlock, 'Extradition, Death Row and the Convention,' *E.L.Rev.* 1990, 15 87; Christine van den Wyngaert, 'Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?' 39 *I.C.L.Q.* 3, 757 (1990); Susan Marks, 'Yes, Virginia, Extradition May Breach the European Convention on Human Rights,' 49 *Cam. L.J.* (1990) 194; William A. Schabas, '*Soering's* Legacy: The Human Rights Committee and the Judicial Committee of the Privy Council Take a Walk Down Death Row,' 43 *I.C.L.Q.* 4, 919 (1994); Jon Yorke, 'Europe's Judicial Inquiry in Extradition Cases: Closing the Door on the Death Penalty,' *E.L. Rev.* 2004, 29 (4) 546

²³ *Öcalan v. Turkey*, Application No. 46221/99, Chamber Judgment, 12 March 2003; Grand Chamber Judgment, 12 May 2005. For a selection of commentaries on the case see, Stefano Manacorda, 'Restraints on Death Penalty in Europe: A Circular Process,' 1 *J.I.C.J.* 263 (2003); Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights,' *E.J.I.L.* 14(2) 241-264 (2003); Alastair Mowbray, 'The Creativity of the European Court of Human Rights,' 5 *H.R.L.R.* 57 (2004); William A. Schabas, 'International Law, Politics, Diplomacy and the Abolition of the Death Penalty,' 13 *Wm. & Mary Bill Rts. J.* 417 (2004).

the Member State ratifications of *Protocol No. 6* in 1989, the *Öcalan* Chamber considered the ratifications of *Protocol No. 13* in 2003, and the *Öcalan* Grand Chamber considered the developments in 2005. However, the vast majority of the literature on these cases is confined to a case-law analysis and focuses on the basic mechanisms of ratification. The political and legal factors which may challenge the ratifications are not adequately explored. As such there is further scope for a consideration of the wider penological framework of the Council relationship with the Member States' right to choose whether or not to impose a death penalty.

Fifthly, the literature has charted the remarkable development of human rights, but it appears that the possibility of the return of the death penalty is not engaged with. This is because the human rights orthodoxy has not adequately considered the relationship between sovereignty and the death penalty, but also, the specific relationship between the law and the death penalty. This thesis aims to strengthen the human rights discourse by revealing these two positions to demonstrate that constructing human rights standards against the punishment must be viewed as a continuous political project even in those states which have removed the punishment. As such, the current literature has not investigated the possibility of political vicissitudes which may challenge the very legitimacy of the Council texts and undermine the absolute abolition of the death penalty.

The Parliamentary Assembly has on numerous occasions, and the Committee of Ministers has in more restricted terms, claimed that it is possible to achieve

“abolition” of the death penalty.²⁴ These claims have been, on the whole, uncritically accepted by the orthodox human rights scholarship. For instance, the two Council publications on the death penalty, *The Death Penalty: Abolition in Europe*²⁵ and *Death Penalty: Beyond Abolition*²⁶ have not specifically addressed the question of what the Council intends the word “abolition” to mean. Of course, *Protocol No. 13* does mandate for the abolition of the death penalty “in all circumstances,” but when this phrase is placed next to the debates between the Parliamentary Assembly and the Committee of Ministers with regards to the amendment of Article 2(1), the extent of the protocol becomes problematic and the current scholarship has not adequately contrasted these legislative developments. This crucial issue is considered in detail within Chapters Five, Six and Eight.

This question of abolition should be deconstructed as it presumes that the Council has a singular view on the term. It is suggested that, because of the identified frictions between the Committee of Ministers and the Parliamentary Assembly, the two organs do not have a completely harmonious view of the processes for the removal of the punishment. This may have significant implications for whether the punishment is “abolished” or not. Also, the jurisprudence of the European Commission and European Court of Human Rights, has, for example, not adhered to the interpretation provided within various Parliamentary Assembly recommendations and resolutions of both Articles 2(1) and 3. The Assembly has sought to create radical human rights

²⁴ The various Council claims and the specific instruments of the Parliamentary Assembly and the Committee of Ministers are considered throughout this research.

²⁵ See, *The Death Penalty: Abolition in Europe*, above, fn. 20.

²⁶ See, *Death Penalty: Beyond Abolition*, *ibid*.

boundaries, while the Court (and Committee of Ministers), has on numerous occasions, restricted the practical implementation of these statements. The human rights standards created by the Council have contributed to the removal of the death penalty within the region, but it needs to be questioned whether the Council is unanimous on what it means when it states the death penalty is “abolished.” It is suggested that the Council is yet to produce a unified position, and as such, this may reveal fractures within the Council’s human rights discourse.

The vast majority of the literature provides an analysis of the death penalty through a positive law construct, as it focuses on the case-law of the European Court of Human Rights and the interpretation of the Council provisions. This work will highlight frictions within the formulation of human rights standards within the Council. For example, the provisions proposed by the Parliamentary Assembly for prerequisites of state membership post 1994, were not explicitly agreed to by the Committee of Ministers. However, the Assembly persisted without complete support and created its own standards for future state applicants. As such, it may be observed that within the Council’s discourse against the death penalty we witness the development of various fora of human rights standards and this study presents this friction within the organisation.

Furthermore, there is limited enquiry into the philosophy of the legitimacy of the death penalty. The current literature has not explored the significance of the Enlightenment theory of the social contract and the *Treaty of Westphalia* (1648) for the understanding of how the Member States protected the right of the punishment at the genesis of the organisation. In addition, it has not been explored whether this

theoretical construct manifests today. This work investigates whether in 1949 the formation of a European social contract which preserved the right of the death penalty to the governments was present. It is appropriate to investigate the extent to which the Enlightenment theory of the social contract may have contributed to the development of penology and the death penalty in this period. Possible departures from the Enlightenment arguments legitimising the sovereign state right to choose to impose the death penalty will be analysed. There has been no significant literature which engages with these theoretical aspects.

From the viewpoint of the Council and the death penalty, this study attempts to prove that there are a lot of new things to be said. For instance, the work of Jacques Derrida on the issue of political sovereignty has not been embraced adequately, if at all, by any scholar specifically investigating the Council and the death penalty.²⁷ There is some scholarship which has focused on a critical analysis of the death penalty in the United States. Austin Sarat,²⁸ Peter Fitzpatrick²⁹ and Adam Thurschwell³⁰ have applied selected Derridian readings to the United States capital judicial system.

²⁷ I have briefly considered Derrida's work in, 'Blanchot, Foucault, Levinas and Derrida: French Philosophy and the Deconstruction of the Death Penalty,' 12 *Amicus Journal* (2004) 16.

²⁸ Austin Sarat, *When the State Kills: Capital Punishment and the American Condition*, (Princeton: Princeton University Press, 2001).

²⁹ Peter Fitzpatrick, "'Always More to Do.'" Capital Punishment and the (De)Composition of Law' in Austin Sarat (ed), *The Killing State: Capital Punishment in Law, Political and Culture*, (New York: Oxford University Press, 1999).

³⁰ Adam Thurschwell, 'Ethical Exception: Capital Punishment in the Figure of Sovereignty,' in Austin Sarat and Jennifer Culbert, (ed) *Killing States: Lethal Decisions, Final Judgments*, (Cambridge: Cambridge University Press, 2008) (forthcoming).

Fundamentally, Derrida has made the claim (from reading the Enlightenment social contract theorists which this work will refer to in later chapters) that it is impossible to separate Western European sovereignty from the death penalty.³¹ Derrida has deconstructed this tradition of Western philosophy and has declared:

it is impossible to separate political sovereignty from the power over life and death...In order to maintain an essential aspect of its sovereignty, the state must reserve the right to impose the death penalty, at least in exceptional cases.³²

To date, no scholarship has attempted to reconcile Derrida's observations with the Council edicts which provide "abolition in all circumstances." On its face, an incompatible penological scenario is presented which needs to be investigated. It is argued that because the literature has not dealt with this incompatibility, the scholarship has only identified the *fact* that the death penalty has been removed from municipal statutes, but it has not investigated the *way* in which it has been removed.

As a general observation the existing literature charts the lineage of the removal of the death penalty in Council Member States without exploring what effects political

³¹ The work of Jacques Derrida will be relied upon within this thesis. For example, see Jacques Derrida, 'Capital Punishment: Another "Temptation of Theodicy,"' p. 197, in Seyla Benhabib and Nancy Fraser (eds) *Pragmatism, Critique, Judgment: Essays for Richard J. Bernstein*, (Cambridge: The MIT Press, 2004); Jacques Derrida and Elisabeth Roudinesco, 'Death Penalties,' pp. 139-165, in *ibid*, *For What Tomorrow...A Dialogue*, (Stanford: Stanford University Press, 2004); Keryon Huigens, 'Derrida on the Death Penalty,' *Cardozo Life*, Winter 2001, www.cardozo.net/life/winter2001derrida

³² Kyrion Huigens, *ibid*.

threats may have on the existing human rights discourse and state removal of the punishment. What this literature predominantly offers is the observation that states may at one time abolish the death penalty, and at another time reinstate the punishment, and possibly oscillate back and forth. The reasons for such change are not explored or adequately explained. This thesis is an attempt to fill this lacunae by offering explanations as to *why* and *how* the penological changes have occurred in Council Member States. It is the understanding of the *why* as well as *how* which leads to effective programmes to help ensure that the punishment remains “abolished.”

1.3 Thesis Questions

The fundamental question of this research is therefore: has the Council’s human rights discourse penetrated the sovereign Member State “right” whether or not to choose to impose the death penalty in a specific case? If the Council has penetrated this right, is it a penetration which has led to a *severing* of the right from the Member States or is it only a penetration which contributes to a *suspension* of the punishment? The significance being that if a severance has occurred then the death penalty can never return. But if only a suspension has resulted, then the punishment can be revisited following changes in political and legal circumstances in the Member States.

The distinction between severance and suspension may be a mere matter of time. It could be argued that the death penalty is currently severed from the Member States, and thus, a literal “abolition” has occurred. Or it may be that only a suspension has been achieved, and as such the term, abolition, does not mean its Latin etymological

root of *abolēre* “to destroy” which attracts a certain finitude in that the death penalty is *forever* done away with. It does appear that the term “abolition” has historical significance, and as such it is used because we are familiar with it and it is merely the best word we currently have; even if it is an imperfect word. This thesis accepts this latter position when it analyses the extent of the Council’s abolitionist discourse. However, it will be appropriate to investigate what the Council means through the use of “abolition” in its protocols and communications.

The theoretical excavation cannot remain at this point, because we need to ask: is there an official Council position on the use of the word “abolition” or are there differing opinions within the various Council organs? Do the communications by the Parliamentary Assembly and the Committee of Ministers demonstrate a common use of the word? Is there disagreement between the different Council organs or even ambivalence to suit specific political circumstances? If the Council has established the eternal removal of the death penalty through *Protocol No. 13*, the punishment is literally “abolished.” But if *Protocol No. 13* does not have the effect of maintaining the removal of the death penalty then its very purpose (abolition in all circumstances) will be called into question. Furthermore, on the possible identification of “abolition” under *Protocol No. 13*, has the European Court of Human Rights contributed to an understanding of the penological processes? Does the jurisprudence provide clarity on the use of “abolition” or merely identify a further fora of ambivalence or contradiction?

The Council has been debating the specific issue of whether the death penalty should be abolished in all circumstances since 1994. However, after fourteen years of

attempts to remove the death penalty from Article 2(1), we still have it. Why? Is there agreement among all the Council organs on its application? Do all the Council organs agree that the article needs amending? If so, what should be amended? And what are the mechanisms for amendment? This thesis is concerned with discovering within the juxtaposition of the Council and the Member States where the locus of the ultimate power to use the death penalty lies. If the death penalty is still intricately connected to sovereignty, the issue is to identify to what extent the Council has reduced the *sovereignty* of the *sovereign* Member States.³³ Is it to a degree which prevents the imposition of the punishment under every circumstance?

1.4 Thesis Proposed

In the 1970s Michel Foucault, the French philosopher, observed that:

giving up the death penalty while citing the principle that no public authority has the right to take anyone's life (any more than any individual does) is to engage an important and difficult debate.

and he questioned at the dawn of the removal of the punishment in France in 1981 that:

[d]o we want the debate on the death penalty to be anything other than a discussion on the best punitive technologies? Do we want it to be the occasion

³³ See both references to Derrida, above, fn. 31.

for the beginning of a new political reflection? Then it must take up the problem of the right to kill at its root, as the state exercises that right in its various forms. The question of more adequately defining the relations of individual freedom and the death of individuals must be taken up anew, with all its political and ethical implications.³⁴

This thesis is, in part, a response to Foucault's demand. It attempts to take the subject of the Council and its discourse against the death penalty, and the apparent Member State relinquishing of its right to impose the punishment, to its root. Foucault identified that the state fundamentally has a right of the death penalty. He did not specifically engage with the *Convention* in 1981, but he called for the political and ethical implications of the punishment to be debated. This thesis is a contribution to the debates on the removal of the punishment within the Council.

The analysis is therefore divided into three parts. Part One "Establishing the European Sovereign Right of the Death Penalty," affirms the traditional argument that the death penalty is fundamentally a sovereign state issue. In Chapter Two, the creation of the Council through the signing of the *Statute* in 1949 and the drafting of the *Convention* between 1949 and 1950 are considered. The *Statute* was a masterstroke in European liberalism which facilitated the interests of state sovereignty, and also implicitly allowed the continuation of the death penalty following the catastrophic events of World War Two. *Statute* Articles 1 and 3 provide

³⁴ Michel Foucault, *Against Replacement Penalties*, p. 459-460, in Michel Foucault, *Power: Essential Works of Foucault, 1954-1984*, Vol. 3, (ed, James D. Faubion) (London: Penguin, 1994).

for the identification of a European “common heritage” and the promotion of the “rule of law,” and as the death penalty was both historically accepted, and also judicially applied, it was mandated as a legitimate punishment.

It is argued that to understand how the death penalty was preserved at the creation of the Council, we need to consider the Enlightenment social contract theory and the rights of sovereign states established 300 years earlier at the *Treaty of Westphalia* in 1648.³⁵ Both the social contract and the treaty sought to legitimise sovereign rule. Although there are differing contract theories, and the nuances are explored in Chapter Two, they all agreed that for the sovereign to be able to rule effectively, it must encompass the right over life and death. This would include the right to judicially put to death. It appears paradoxical, but during the Enlightenment, in order for governments to protect the right of life of its subjects, it needed ultimate control and authority. To combat the threat of death and thus protect life the right to impose death was vested.

³⁵ The arguments for both the utility of the social contract and the Treaty of Westphalia for this thesis are constructed by paralleling political processes which resulted in 1949 with what happened in 1648, and also the arguments proposed by the Enlightenment philosophers. In support of these arguments, see Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (Cambridge: Cambridge University Press, 2006), p. 2. Greer argued that the formation of the Council was a product of the Enlightenment liberalising process; see also, Gene M. Lyons and Michael Mastanduno, (eds), *Beyond Westphalia? State Sovereignty and International Relations*, (Baltimore: The Johns Hopkins University Press, 1995); Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, (Princeton: Princeton University Press, 2001); Martin Loughlin, *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), pp. 73-75.

The acceptance of the punishment within the drafting debates of the *Convention*, is then considered as a manifestation of these historical readings. The punishment was unanimously accepted during the drafting of Article 2(1), and also under Article 3, no arguments were proposed to identify that it violated the prohibition against “inhuman...punishment.” Although the *Convention* was created for the protection of individual rights, the drafters were clear that the document also protected the right of the state to choose whether or not to apply the death penalty. Significantly, at the beginning of the Council, it acquiesced in this penological position and thus it was not considered to be a violation of human rights.

Chapter Three then turns to the removal of the death penalty in Western Europe, with France being the final country to refuse to apply the punishment for ordinary crimes in 1981. The chapter chronicles this development and argues that although the *Convention* came into force in 1953, during the intervening 28 years this geopolitical region removed the punishment without any specific reference to the text of the *Convention*. Hence, it appears that the human rights instrument did not directly contribute to the penological evolution and thus something else produced the hegemonic arguments which changed the minds of European governments.

Post-war there was a proliferation of arguments questioning the morality of the punishment, including highlighting the possibility that innocent people have and could be executed, and also the general brutalizing effect of the punishment was emphasised. This chapter aims to show that as Europe became more stable and peaceful, the prominent argument which was used in removing the death penalty was that it lost its utilitarian quality and was not a greater deterrent to murder than a prison

sentence.³⁶ Hence the death penalty was removed for normal criminal offences but still reserved by most states for wartime offences if the punishment was required for state protection. This revolution in Western European penal policy was not as a result of any centralised and established Council position against the punishment, but the state government decisions being made independently and with minimal state-to-state dialogue.

However, the possibility of accurate historical rendition must always include the nuances of the story. This legal genealogy is no exception. Although the above arguments will be presented through the use of references to the historical texts on the death penalty, they do not tell the whole story. We must also look behind the texts to see that although the specific *Convention* did not directly contribute to abolition, the humanistic sentiments interwoven within the instrument did have a significant impact.³⁷ The humanism inherent within the right to life and the prohibition against inhuman treatment certainly provided cogent claims to which governments became susceptible. It is through an interweaving of the discourses that we realise how the *Convention* and the complete ideology of the Council established under the *Statute* evolved to open the door for the death penalty to be encompassed as a question of, and thus scrutinised by, human rights.

³⁶ For example, see, H.L.A. Hart, 'Murder and the Principles of Punishment: England and the United States,' in *ibid*, *Punishment and Responsibility: Essays in the Philosophy of Law*, (Oxford: Clarendon Press, 1968).

³⁷ The great work of the Italian humanist Cesarea Beccaria was liberally referred within the Council and the references are included in the research below.

This specific development is then charted in Part Two “The Genesis and Evolution of the European Discourse Against the Death Penalty.” The *Convention* human rights discourse evolved to produce arguments to dissect, restrict, and renounce, the punishment within Member States, and also importantly, in cases where criminal suspects held in Member States could be extradited to third states to face a capital trial. Human rights became a powerful tool for the anti-death penalty movement in the Council and the Member States. The jurisprudence of the European Court of Human Rights also evolved to contribute significantly to the anti-death penalty debate.

Chapter Four therefore focuses on the establishment and promotion of a centralised *Convention* human rights discourse. Three historical periods are considered. Firstly, 1957 to 1972, where there was an absence of any specific human rights curtailment of the punishment. Up until the removal of the death penalty in Western Europe, the Council appeared unsure how to use the *Convention* to provide human rights scrutiny. The first case before the European Commission on Human Rights concerning a Member State application of the death penalty, but in a colonial region, was *Greece v. the United Kingdom*.³⁸ The Commission held that following the aftermath of the ‘Cyprus Revolt’ from 1954-56, the British executions of revolutionaries did not

³⁸ *Application by the Government of the Kingdom of Greece, lodged against the Government of the United Kingdom of Great Britain and Northern Ireland*, No. 176/56, *Application of the European Convention of Human Rights and Fundamental Freedoms to the Island of Cyprus*, *Report of the European Commission of Human Rights*, Doc. No. A 42.048, (Article 31 of the Convention) (Strasbourg, 26 September, 1958).

violate the *Convention*.³⁹ Such distancing of the death penalty from human rights analysis was furthermore seen in the first official Council report on the death penalty in 1962, which was authored by Marc Ancel, the French criminologist. The report was restricted in its mandate and confined to pointing to the fact that the death penalty was a “problem.”⁴⁰ Then the Committee of Ministers instructed the European Committee on Crime Problems to investigate the matter further. Both the Commission’s decision and the report did not consider the death penalty as a human rights issue, but a sovereign state question.

In the second period between 1973 and 1979, the first debates on the punishment within the Parliamentary Assembly are considered. It is seen that the Assembly was unable to agree on how to proceed with a human rights analysis of the punishment, and so the question was dropped from its agenda. At this time the death penalty was still thought of as an anomaly which the human rights discourse had difficulty rectifying. The work of the European Committee on Crime Problems was considered to have been ineffective in solving this “problem.” However, in the third period, between 1980 and 1983, a substantial meeting of the minds occurred within the Parliamentary Assembly, and they began to formulate the arguments that the punishment possibly violated Article 2(1) and Article 3. What then occurred through the adoption of *Protocol No. 6* in 1983, which provides for abolition of the death penalty in peacetime, is a gradual development of human rights standards aimed at

³⁹ See, Robert Holland, *Britain and the Revolt in Cyprus, 1954-1959*, (Oxford: Clarendon Press, 1998); Nancy Crawshaw, *The Cyprus Revolt: An Account of the Struggle for Union with Greece*, (London: George Allen & Urwin, 1978).

⁴⁰ See, Marc Ancel, *The Death Penalty in European Countries: Report of the European Committee on Crime Problems*, (Strasbourg: Council of Europe Publishing, 1962).

restricting state choice over the punishment. The tide had firmly turned, and human rights were seen as providing a platform from which the punishment could be denounced.

Cases before the European Commission of Human Rights and European Court of Human Rights grew exponentially, and Chapter Five analyses the judicial interpretation of Article 2(1) which protects the “right to life.” The Commission and Court grappled with the paradoxical element in that this fundamentally deontological provision which focuses on the premier individual right, also incorporated the possibility of judicial executions. The complication of the discourse does not end there, as the Parliamentary Assembly now argues that Article 2(1) is inapplicable because of the evolved human rights standards, and so the death penalty should be removed from the *Convention*. However, the Committee of Ministers stalled the legislative process for the amendment of the text, and even following the adoption of *Protocol No. 13* which abolishes the death penalty in “all circumstances,” Article 2(1) still remains intact.

As a consequence, it is argued that the current anomaly appears to leave the door ajar for the punishment to be implemented, and this possibility is reflected within the strongly worded recommendations which the Parliamentary Assembly has presented to the Committee of Ministers on the issue. However, the final conclusion of this chapter is that from a jurisprudential perspective, although the European Court of Human Rights has hitherto refused to apply judicial amendment to the text of the *Convention* by holding that Article 2(1) is now obsolete, the possible imposition of the punishment appears to be more a theoretical than practical possibility.

The interpretation of Article 3's prohibition on inhuman and degrading treatment or punishment is considered in Chapter Six. It is argued that in juxtaposition to the differing interpretations of Article 2(1), there is a conflict of interpretation concerning the threshold of Article 3. What the different positions demonstrate is that the Council is yet to harmonise successfully Article 2(1) and Article 3. It is argued that the key disjunctive factor is the Council's inability to grapple with the question over the state's right to impose the death penalty. The debates ultimately revolve around whether the inhuman punishment provision provides a *per se* ban on the death penalty. This chapter analyses the different organ interpretations, the recommendations and resolutions on this question.

The Parliamentary Assembly has called for the death penalty to be declared a *per se* violation of Article 3, but the Committee of Ministers has not specifically accepted this absolute position. The restrictive holdings of the European Court on Human Rights have similarly confined the scope of the Article to curtail the punishment but not used to attack its very foundation. However, the case-law has been effective in renouncing the punishment following unfair trials, to considering that prolonged detention is inhuman, and that certain conditions on death row are also a violation of Article 3.

Furthermore, the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment has initiated beneficial investigations of the different aspects of the Member States' capital judicial systems, with specific

focusing on prison conditions and the mental health of inmates.⁴¹ Its work has been invaluable for aiding the Court in its findings. Article 3 has proved to be effective in restricting the scope of the punishment to such an extent that, as with Article 2(1) above, the possibility of the punishment is more theoretical than of practical possibility.

Finally, Part Three, “The Global Promotion of the Council’s Discourse Against the Death Penalty,” considers the expansion of the Council *post*-1994, and also the widening of its focus to support the international initiatives of the European Union and the Organisation for Security and Co-operation in Europe. Chapter Seven continues to explore the friction between the Parliamentary Assembly and the Committee of Ministers during the expansion of the Council. It is argued that the Parliamentary Assembly initiated the requirement that joining states must sign and ratify *Protocol No. 6* within three years.

However, it is revealed that the Committee of Ministers was not in complete agreement concerning this precondition. It is demonstrated that this disagreement is also present with regards to the human rights standards expected of observer states. Furthermore, even though the majority of states have complied with the Council’s membership regulations, there is still, within some states, an underlying political discomfort in adopting the abolitionist stance.

⁴¹ See, The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, at www.cpt.coe.int.

But even with these identified fractures within the discourse the Council has not been prevented from achieving a remarkable removal of the punishment within its region. It is perhaps difficult to highlight the problems with the discourse and not recognise the value of what the Council has achieved as a collective political body. Indeed, a remarkable penal change has been accomplished, and in evidence of this success the Council has joined the anti-death penalty initiatives of the European Union and the Organisation for Security and Co-operation in Europe. Both of these organisations are now promoting abolition for their Member States and beyond. The European Union has had a significant impact with filing *amicus curiae* briefs within the U.S. Supreme Court, and has also played a crucially important role in the United Nations General Assembly adoption of the Resolution on a moratorium of the use of the death penalty on 18 December 2007.⁴² The Council has supported these initiatives, and this international exposure has a significant impact for the legitimacy and strengthening of the discourse within its own region.

The Conclusion in Chapter Eight reviews this legal genealogy of the relationship of the sovereign state right of the death penalty, and the penetration of this relationship by the Council. It is argued that the Council's anti-death penalty initiatives have evolved to contribute significantly to the demise of the punishment within the region. In fact, the Council's discourse can now be read to modify the Enlightenment social contract theory, and the rights of sovereign states within the *Treaty of Westphalia*. The removal of the punishment can be seen as a fundamental change in the understanding of what is the rule of law and the common heritage from Europe in

⁴² *Moratorium on the use of the death penalty*, A/RES/62/149, 76th Plenary Session, 18 December 2007.

1949, to what has manifested in 2008. As a consequence, the Council has created a regional political and legal situation where the death penalty is no longer part of legitimate rule in Europe, and so it has penetrated the *sovereignty* of the *sovereign* state to the extent that it has removed the punishment.

However, the final observation of this thesis is that the Council's discourse, and the anti-death penalty arguments within Member States, should not disappear when the punishment disappears. This is because the removal of the death penalty is a continuous political project. If the human rights community becomes complacent, the punishment may return when the governments are confronted with circumstances which threaten their legitimate political rule. As such, the Council's discourse has achieved a *suspension* of the punishment from the Member States, and as a consequence, the anti-death penalty discourse must be viewed as a *never-ending political project*.

Chapter Two:
The Creation of the Council of Europe and the Preservation of
the Death Penalty

2. The Creation of the Council of Europe and the Preservation of the Death Penalty

2.1 Introduction

This chapter provides a historical story which reveals that post-World War Two European politics and human rights considered the death penalty in a very different light to how we perceive it today. In 1949 the Council was created and within its project for promoting peace, stability and security in Europe, the construct of a system of human rights was one of its foremost aims. Within this, the parameters for the continued application of the death penalty were considered. The aim of this chapter is to investigate to what extent the sovereign government's right to choose whether or not to impose the death penalty was present at firstly, the creation of the Council of Europe, and secondly, when the *Convention* was drafted. The *Statute* and the *Convention* drafting debates in the published *travaux préparatoires*¹ are considered, and specifically for these investigations, it is analysed to what extent the death penalty came to be thought of as part of a Council "common heritage" and the "rule of law."

To achieve this, selected readings of European history, Enlightenment politics through the construction of state rights within the *Treaty of Westphalia* in 1648, and the theory of the social contract, are applied to the *Statute* and the *Convention*. Also,

¹ Council of Europe, *The Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, (The Hague: Martinus Nijhoff, 1975). Hereinafter "TP," with the volume number following.

the drafter's adaptation of natural law and the debates concerning "reason of state" are analysed. Identifying what is a legitimate state response when it is threatened is a fundamental issue for these investigations. This chapter aims to assess the foundation of the state right of the death penalty, because, as the further chapters of this thesis demonstrates, the challenge for the human rights arguments against the death penalty today, is ultimately about dismantling this central issue of right.

2.2 The Statute of the Council of Europe and the Preservation of the Death Penalty

On 5th May 1949 the *Statute* was signed in London by ten European governments, and the Council was created.² The most important aim of this new human rights organisation was seen to be the promotion of unity among European states and facilitate the healing of the social and political ruptures caused by World War Two.³ A recognisable feature of this process was the shift in emphasis on sovereign state rights in international law, to the protection of individuals through a new regional system of human rights.

² The original ten signatory states were: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

³ See, *Europe is threatened, Europe is divided, and the greatest danger comes from her divisions*, declaration of the Congress of Europe, 7 to 10 May 1948, in Alastair Mowbray, *Cases and Materials on the European Convention on Human Rights*, 2nd ed, (Oxford: Oxford University Press, 2007), pp. 1-2.

One of the first projects the Council undertook was to formulate the *Convention* to mandate human rights. To achieve this the Committee on Legal and Administrative Questions was established in 1949 and Sir David Maxwell-Fyfe was appointed as chairman and Pierre-Henri Teitgen as *rapporteur*. During the initial quorum of the drafting meetings, Teitgen took the floor and identified the intrinsic value of *Statute* Articles 1 and 3 to the proceedings.⁴ Article 1 states:

The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their *common heritage* and to facilitate their economic and social progress (emphasis added).

and Article 3 states:

Every member of the Council of Europe must accept the *principles of the rule of law* and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the Council (emphasis added).

Teitgen argued that these two *Statute* Articles provided the guiding legislative framework which Maxwell-Fyfe approved.⁵ It will become clear that the *Statute*

⁴ Speech by Pierre-Henri Teitgen, *rapporteur*, the Committee on Legal and Administrative Questions, *TP*, 1, above, fn. 1, pp, 38, 290.

⁵ *ibid*, p. 114; Furthermore, M. Jaquet, a French representative, identified the importance of the two Articles, p. 134; and Article 1 was specifically mentioned in a Committee questionnaire, p.

Article 1 identification of a European “common heritage” and Article 3 promotion of the “rule of law” provided the life-line for the drafting of the *Convention* text.

The Article 1 search for a “common heritage” of the Council was identified as a desired aim within the *Statute* Preamble. The second paragraph makes reference to “spiritual and moral values which are the common heritage of their peoples,” and that “although heterogeneous in many respects...they have a certain tradition of history and civilisation which is common to all of them.”⁶ This notion of a common heritage has been recognised by the European human rights scholars, Steven Greer⁷ and Alastair Mowbray,⁸ to be part of the core principles which underpinned the Council’s creation. To achieve a more complete picture of how this common heritage was created, different readings are proposed for guidance, including ancient European history, Christian history, the contribution of the Enlightenment through the *Treaty of Westphalia* and the social contract theory.

156, and M. Wold, the representative from Norway, discussed the binding nature of Article 3 on the drafting process, in *TP*, 2, above, fn. 1, p. 170.

⁶ Preambles to treaties often reveal the political objectives of the contracting parties as, J.G. Merrills and A.H. Robertson stated it is “useful for locating the political obligations that follow in a historical context,” in *Human Rights in Europe: A study of the European Convention on Human Rights*, 4th ed, (Manchester: Manchester University Press, 2001), p. 1.

⁷ See, Steven Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (Cambridge: Cambridge University Press, 2006), pp. 15-16.

⁸ Alastair Mowbray has also stated that the “major aim of the Council of Europe was to achieve greater unity between the Member States,” in *Cases and Materials*, above, fn. 3, p. 2.

The Group of Officials of the Secretariat (hereinafter, “Group”) outlined what the essential aspects of such historical heritage were and observed that “undoubtedly the cumulative influence of Greek philosophy, Roman law, the Western Christian Church, the humanism of the Renaissance and the French Revolution,” moulded the initial structure of the Council and its relationship with its Member States.⁹ One reading of the Group’s philosophical and historical genealogy would point to the moral and ethical arguments for the promotion of peace, wellbeing and mutual respectful relationships both between individuals and between states. Such a lineage may be observed through key publications within these different historical periods, by considering Aristotle’s *The Politics*,¹⁰ Plato’s *The Republic*,¹¹ Thomas Aquinas’s *Summa Theologica*,¹² Immanuel Kant’s *Perpetual Peace*,¹³ and Thomas Paine’s *The Rights of Man*.¹⁴ But this reading alone would not encompass all aspects of a common heritage, and for the present investigations, the genealogical manifestation of the sovereign state’s right to choose whether or not to implement the death penalty in certain circumstances.

⁹ A Group of Officials of the Secretariat, *Manual of the Council of Europe: Structure, Functions and Achievements*, (London: Stevens and Sons, Ltd, 1970), p. 8.

¹⁰ Aristotle, *The Politics*, (trans: T.A. Sinclair)(London: Penguin, 1981).

¹¹ Plato, *The Republic*, (trans: Desmond Lee)(London: Penguin, 1987).

¹² Thomas Aquinas, *Summa Theologica*, 5. vols. (Resource for Christian Living, 2000).

¹³ Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, pp. 93-125, in H.S. Reiss (ed), *Kant: Political Writings*, (Cambridge: Cambridge University Press, 1970).

¹⁴ Thomas Paine, *The Rights of Man*, pp. 201-364, in *The Thomas Paine Reader*, (ed, Michael Foot and Isaac Krammick, (London: Penguin, 1987).

The subject of the death penalty is a major part of European history. Historical records recount the acceptance of the punishment in ancient Greek philosophy by Aristotle, when he identified that “sovereign powers...cover decisions as to...the penalties of death.”¹⁵ Plato stated that for “impious deeds that bring about the ruin of the state...*the penalty* is death.”¹⁶ In Roman law, the sanguine use of the death penalty in the Draconian Code *circa* 621 BCE was recorded by Plutarch, the ancient Roman historian. He observed the dramatic impact of Draco’s laws as, “death was appointed for almost all offences, insomuch that those that were convicted of idleness were to die, and those that stole a cabbage or an apple to suffer even as villains that committed sacrilege or murder.”¹⁷

In Roman legal history, the right to put to death has been identified as being derived from the principle of the *patria potestas* which granted the father the absolute right to kill his own children and slaves. J.L. Strachan-Davidson, the Roman legal historian, stated that the *patria potestas* “with its consequent right of personal chastisement and its fullest powers of life and death,”¹⁸ were transferred to the Roman state. Michael Foucault was in agreement with this historical interpretation when he noted that “[f]or a long time, one of the characteristic privileges of sovereign power was the right to decide life and death. In a formal sense, it derived no doubt from the ancient *patria*

¹⁵ Aristotle, above, fn. 10, para 1298a3, p. 227.

¹⁶ Plato, *The Laws*, (trans: Trevor J. Saunders)(London: Penguin, 1975), Book 8, s. 16, pp. 355-360.

¹⁷ Plutarch, *The Lives of the Noble Grecians and Romans*, (Chicago: Encyclopaedia Britannica, 1952), p. 70.

¹⁸ J.L. Strachan-Davidson, *Mommsen’s Roman Criminal Law*, *The English Historical Review*, Vol. 16, No. 62, (Apr. 1901), p. 222.

potestas that granted the father of the Roman family the right to “dispose” of the life of his children and his slaves.”¹⁹ This position has also recently received support from the Italian philosopher, Giorgio Agamben.²⁰ The influence of Roman law on the municipal legal systems demonstrates there are strong grounds for arguing that the origin of the modern European sovereign’s claim to the death penalty arose from this historical position.

However, there are further aspects of this European common heritage which are relevant and contribute in significant ways. The power of the death penalty mutated as Christian religion and then secular governments evolved. Christianity embraced the Inquisition and derived the legitimacy for mass executions from, predominantly, the Catholic Church’s interpretation that the Christian God endorsed such punishment.²¹ The Enlightenment witnessed the evolution of the Kantian categorical imperative of the death penalty being required for the satisfaction of the *lex talionis*.²²

This reading of the Group’s identified historical lineage also requires qualification through a juxtaposed argument which will percolate throughout these investigations. Just as the above reveals that the sovereign right to choose whether or not to use the

¹⁹ Michael Foucault *The Will to Knowledge: The History of Sexuality* vol. 1 (trans: Robert Hurley)(London: Penguin, 1976) p. 135.

²⁰ See, Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford: Stanford University Press, 1995), p. 128.

²¹ James J. Megivern, *The Death Penalty: An Historical and Theological Survey*, (New York: Paulist Press, 1997), pp. 97-122.

²² Immanuel Kant, *The Metaphysics of Morals*, pp. 154-159, in H.S. Reiss (ed) *Kant: Political Writings*, (Cambridge: Cambridge University Press, 1970).

death penalty is an intricate part of European legal, political, philosophical and religious history, so too are the arguments *against* the punishment.

The earliest recorded European debate on the death penalty is provided by the ancient Greek historian, Thucydides, which occurred in Athens in 427 BCE. The result was that the Mytilenian revolt was not punished with death by the Athenians.²³ After Cleon, the son of Cleaenetus, had fervently spoken in the Areopagus in favour of executing the Mytileanians, Diodotus, the son of Eucrates, gave a passionate plea for the sparing of their lives. He argued, “[w]e must not...come to the wrong conclusions through having too much confidence in the effectiveness of capital punishment, and we must not make the condition of rebels desperate by depriving them of the possibility of repentance.”²⁴

Furthermore, the ancient Roman jurist, Marcus Tullius Cicero, during his infamous oratory in Roman courts, and his “lifelong practice as counsel for the defence,”²⁵ powerfully argued against the death penalty. He stated his anti-death penalty position in that:

[n]othing in the world could give me greater satisfaction than the knowledge that I myself, during this present consulship of mine, had succeeded in expelling the executioner from the Forum...What I...assert is that the presence of an

²³ Thucydides, *History of the Peloponnesian War*, (trans: Rex Warner) (London: Penguin, 1972), pp. 194-223.

²⁴ *ibid*, p. 221.

²⁵ Cicero, *Murder Trials*, (trans: Michael Grant)(London: Penguin, 1990), p. 267.

executioner must never, come what may, pollute the places where the Assembly meets.”²⁶

Arguments against the death penalty were also heralded in early Christianity as the Waldensian sect were opposed to the Catholic imposition of the punishment.²⁷ As the Enlightenment continued the Italian humanist, Cesare Beccaria, presented his famous criminological treatise which *inter alia* argued against the punishment,²⁸ and Voltaire exported the Italian’s humanistic arguments to France.²⁹ Before he turned to a sanguinary use of the guillotine once in power, Maximilien Robespierre had vehemently renounced the punishment.³⁰ In 1831 Jeremy Bentham adapted his utilitarian theory to specifically attack the efficacy of the French use of the guillotine.³¹

However, reviewing this historical period we are left with a brutal story which reveals that across Europe the states’ power prevailed over the anti-death penalty arguments. The exercise of power was entrenched through a legitimising process intricately

²⁶ *ibid*, p. 273.

²⁷ Megivern, above, fn. 21, pp. 99-103.

²⁸ Cesare Beccaria, *An Essay on Crimes and Punishment*, (1775: Chicago: Branden Press, 1983), Chapter. 28.

²⁹ Voltaire, *Commentary on the book ‘On crimes and punishments,’ by a provincial lawyer*, pp. 244-279, in David Williams (ed), *Voltaire: Political Writings*, (Cambridge: Cambridge University Press, 1994).

³⁰ Jean Matrat, *Robespierre: Or the tyranny of the Majority*, (trans: Alan Kendall)(London: Angus and Robertson, 1975), p. 106-107.

³¹ See generally, Jeremy Bentham, *To His Fellow Citizens of France on Death Punishment*, (London: Robert Heward, 1831).

revealed within political philosophy. It will not be until the later part of the nineteenth century that European governments began to question their right of the death penalty, and the state renunciation of the punishment is the subject of the next chapter. So a vast political history reveals that the state has acquired the right of making capital laws.

Placing the above history within the Enlightenment, we can see that at the dawn of the modern nation state, the death penalty was accepted as a legitimate punishment of the governing sovereigns. The European monarch's signing of the *Treaty of Westphalia* in 1648 lays the specific legal foundation for this enquiry. Steven Greer has identified that the formation of the Council was a product of the Enlightenment liberalising process.³² To further understand how this process contributed to the identification of the death penalty as being part of the common heritage and rule of law of the Council in 1949, it is necessary that we briefly outline the significance of the treaty. The American death penalty scholar, Adam Thurschwell, has argued the relevance of such legal-political history for an analysis of the death penalty. He has observed:

there is a remarkable consensus in Western political philosophy, from the beginnings of post-Westphalian modernity to the present day, that identifies the essence of political sovereignty with the sovereign power to kill.³³

³² Greer, above, fn. 7, p. 2.

³³ Adam Thurschwell, *Ethical Exception: Capital Punishment in the Figure of Sovereignty*, p. 11, in Austin Sarat and Jennifer Culbert, (ed) *Killing States: Lethal Decisions, Final Judgments*, (Cambridge: Cambridge University Press 2008) (forthcoming).

Thurschwell has noted a lineage for enquiry from this period in modernity through to contemporary penological analysis. He states that the political philosophy interpreting this lineage of sovereign power “is not only consistent over time, but more remarkable yet, across widely divergent traditions of thought [including the] liberal social contract theory.”³⁴ Thurschwell’s observation on the relevance of the *Treaty of Westphalia* and the social contract theory to contemporary research on the death penalty can be applied to the drafting of the *Convention*. Let us therefore first consider the treaty, and then the social contract in this context.

In 1949 the governments had, in effect, presented to the Council their heritage emanating from the *Treaty of Westphalia*. It is generally accepted that the origin of the modern state can be charted to this late medieval period,³⁵ as it marked the ceasing of the Thirty Years War (1618-1648), which encompassed the bloody religious struggles between the Catholic and Protestant Churches. The *Treaty of Westphalia* was signed to install peace in Europe. A politico-legal modernising project was initiated which dwindled the authority of natural and ecclesiastical law,³⁶ through the formulation of positive law within specific territories.³⁷ This was the

³⁴ *ibid.*

³⁵ See, Gene M. Lyons and Michael Mastanduno, (ed) *Beyond Westphalia? State Sovereignty and International Relations*, (Baltimore: The Johns Hopkins University Press, 1995), p. 5; Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations*, (Princeton: Princeton University Press, 2001), p. 23; Martin Loughlin, *The Idea of Public Law*, (Oxford: Oxford University Press, 2003), pp. 73-5.

³⁶ See, Megivern, above, fn. 21, pp. 51-97.

³⁷ See, Loughlin, above, fn. 35, pp. 73-5.

genesis of the liberal state, as the “right to life and death” was prised away from the Catholic Church and placed within the hands of the sovereigns governing individual territories.

Exclusive territorial control was reserved to the royal monarchs as outlined in the *Treaty of Westphalia*, Articles 64, 65 and 67,³⁸ which initiated: a) exclusive territorial rule, b) the prohibition of external interference of this rule, c) treaty making rights, d) exclusive rights for the formulation and interpretation of municipal laws, and e) as a result, each state was free to install their own criminal (including capital) judicial systems.³⁹ M.D.A. Freeman argued that the *Treaty of Westphalia* created a new “legal order” in Europe.⁴⁰ Martin Loughlin suggested that “an important aspect of this modernising project was the manner in which law was deployed.”⁴¹ Positive law became an important tool for the government of the modern state and so the role of

³⁸ The Treaty of Westphalia 1648, Article 64, “...every one of the Electors, Princes and States of the Roman Empire, are so establish’d and confirm’d in their antient Rights, Prerogatives, Libertys, Privileges, free exercise of Territorial right...” Article 65, “They shall enjoy without contradiction: the Right of Suffrage, interpretation of laws, declaration of wars, imposing of taxes, levying or quartering of soldiers, erecting new fortifications in the Territorys of the States. Article 67, “They shall without molestation keep...full jurisdiction within the inclosure of their walls and territorys.”

³⁹ Article 44, “But for those who are subjects...shall be obliged to conform, and submit themselves to the laws of the Realms, or particular Provinces they shall belong to.”

⁴⁰ M.D.A. Freeman has confirmed the politico-legal ideology of the Westphalian system in that, firstly the independence of states was established which rejected the feudal and papal authority, and secondly, that a new legal order was established, in *Lloyd’s Introduction to Jurisprudence*, 7th Ed, (London: Sweet and Maxwell, 2001), p. 199.

⁴¹ See, Loughlin,, above, fn. 35, p. 75.

positive law would then become intertwined within the legitimising of the death penalty. Richard Evans noted that during this early modern period:

[c]apital punishment's relationship with state formation seems to have been positive rather than negative. With the rise of the modern state, the right of execution, of power over life and death, came to be monopolised by the state and treated as an essential aspect of sovereignty.⁴²

The *Treaty of Westphalia* formulated the model of modern European state power over life and death. This power evolved to produce a legitimate legal principle which allowed the sovereign state to formulate capital laws in 1648.

Enlightenment philosophers such as Thomas Hobbes,⁴³ John Locke⁴⁴ and Jean-Jacques Rousseau⁴⁵ provided a “scientific calculation” for the formation of society⁴⁶ which can be historically discerned as following the political mechanisms set in place by the *Treaty of Westphalia*. Although these theorists proposed differing political approaches to both society and the state, without exception they identified that the

⁴² Richard J. Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600-1987*, (London: Penguin, 1997), p. 893.

⁴³ Thomas Hobbes, *Leviathan*, (edited: J.C.A. Gaskin) (Oxford: Oxford University Press, 1996)

⁴⁴ John Locke, *Second Treatise of Government*, (edited: C.B. Macpherson) (Indianapolis: Hackett Publishing Co, 1980).

⁴⁵ Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and Discourses*, (trans: G.D.H. Cole) (London: Everyman, 2004).

⁴⁶ Philip Ball, *Critical Mass: How One Thing Leads to Another*, (London: Arrow Books, 2005), p. 33.

new political entities were created for the protection of the lives of those within the demarcated territories. Jean-Jacques Rousseau stated, “[l]ook into the motives which have induced men, once united by their common needs in a general society...you will find no other motive than that of assuring the property, life and liberty of each member by the protection of all,”⁴⁷ and John Locke stated that the formation of the Commonwealth to promote the “public good of society. It is a power that hath no other end but preservation.”⁴⁸ Steven Greer observed that the “natural rights theorists of the seventeenth and eighteenth centuries argued...everyone has an equal ‘natural right’ to survive,’ the ‘right to life.’”⁴⁹ Micheline Ishay, the human rights scholar, has similarly affirmed the emanation of natural rights from this period.⁵⁰

The social contract theorists were also unanimous on that for the sovereigns to promote the right to life, it must be able to have ultimate rule over life, and this would include the right to put to death. In what can be seen as adopting the Westphalian ideology, Locke plainly stated the manifestation of the right in that “[p]olitical power, then, I take to be the *right* of making laws with penalties of death.”⁵¹ Hobbes argued through the creation of the *Leviathan* that the “sovereign power of life, and death, is

⁴⁷ Jean-Jacques Rousseau, *A Discourse of Political Economy*, p. 135, in *The Social Contract and Discourses*, (trans: G.D.H. Cole) (London: Everyman, 2004).

⁴⁸ Locke, above, fn. 44, Chapter 11.

⁴⁹ Greer, above, fn. 7, p. 2-3.

⁵⁰ Micheline R. Ishay, stated, “the liberal worldview first emerged out of the struggle for freedom of religion and opinion...laying the groundwork for subsequent claims for a universal right to life,” in *The History of Human Rights: From Ancient Times to the Globalization Era*, (Berkeley: University of California Press, 2004), p. 65.

⁵¹ Locke, above, fn. 44, p. 8.

neither abolished or limited...And therefore it may, and doth happen in commonwealths, that a subject may be put to death by the command of the sovereign power.”⁵² Rousseau stated that “putting the guilty to death” was a right of the sovereign.⁵³ Immanuel Kant went so far as to exclaim that “[a]ll murderers...must suffer the death penalty.”⁵⁴

Adopting the principles from the *Treaty of Westphalia* and the social contract, the state captured a monopoly of legitimate action in national defence and the death penalty. In the early Twentieth Century, the sociologist, Max Weber, argued the identification of the state as being the holder of the “monopoly of legitimate physical force,”⁵⁵ and that the state must hold the ultimate authority to impose sanctions for violation of its laws. Weber described:

[t]he modern position of political association rests on the prestige bestowed on them by the belief, held by their members, in a specific consecration: the ‘legitimacy’ of that social action which is ordered and regulated by them. This prestige is particularly powerful where, and in so far as, social action comprises physical coercion, including the power to dispose over life and death.⁵⁶

⁵² Hobbes, above, fn. 43, Chapter 21, para 7.

⁵³ Rousseau, above, fn. 45, p. 209.

⁵⁴ Kant, above, fn. 13, p. 157.

⁵⁵ Max Weber, ‘Politics as a Vocation,’ p.78, in *From Max Weber*, (trans: H.H. Gerth and C. Wright Mills, (Oxford: Oxford University Press, 1958).

⁵⁶ Max Weber, *Economy and Society*, (ed: Guenther Roth and Claus Wittich) (Berkeley: University of California Press, 1978), pp. 903-4.

Weber's sociological legitimising of the death penalty encompasses the Westphalian legislative and interpretive "monopoly" over criminal sanctions.⁵⁷ Writing during the same time as Weber, the philosopher, Walter Benjamin explicitly identified the death penalty as a manifestation of legitimate violence.⁵⁸ Hence at the formation of the Council, the death penalty can be seen as accepted as a "legitimate" form of punishment and thus within the "rule of law." Such philosophical and sociological observations place the sovereign state and the death penalty within the form of a symbiotic relationship. It is argued that the original Council Member States came armed with this political theorem.

The various theoretical approaches presented above suggest the philosophical context within which the European governments approached the signing of the *Statute* with an acceptance that both the common heritage and the rule of law encompassed the right to make capital laws. Under the *Statute* the Member States had successfully retained the right of the death penalty. But could the Member States still claim this right during the first legislative project of the Council? Was this position reflected in the drafting of the *Convention* between 1949 and 1950? This is considered below.

⁵⁷ This sociological analysis has been accepted by the death penalty scholars, see, Austin Sarat, 'Introduction: On Pain and Death as Facts of Legal Life,' p. 3, Austin Sarat, (ed) *Pain, Death and the Law*, (Ann Arbor: The University of Michigan Press, 2001); Timothy V. Kaufman-Osborn, *From Noose to Needle: Capital Punishment and the Late Liberal State*, (Ann Arbor: The University of Michigan Press, 2002), pp. 50-52.

⁵⁸ Walter Benjamin, 'Critique of Violence,' p. 239, in Marcus Bullock and Michael Jennings, *Walter Benjamin, Selected Writings, vol 1. 1913-1926*, (Belknap: Harvard University Press, 1997).

2.3 The Drafting of the *Convention*

2.3.1 The Aim of the Minimal Definition Requirement

Some scholars argue that the *Convention* drafting debates published in the *travaux préparatoires* generally provide limited use for its interpretation.⁵⁹ However, when the death penalty is specifically considered what was said and not said during the drafting debates is of particular significance for an understanding of the application of the punishment. The *travaux préparatoires* provide information which uncover how the Member State's right to choose whether or not to impose executions appeared within the formation of the *Convention*. In *Soering v. the United Kingdom*, the landmark case concerning an Article 3 analysis of the death penalty, the European Court of Human Rights specifically considered what was "intended by the drafters."⁶⁰ William Schabas has also referred to the published debates in his authoritative work on the death penalty in international law.⁶¹ Indeed, we will see that the published *travaux préparatoires* are extremely useful for understanding the specific *Convention*

⁵⁹ See for example, Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law: A Comparative Study*, (Oxford: Clarendon Press, 1983), p. 48; Clare Ovey and Robin C.A. White, *Jacobs and White, The European Convention on Human Rights*, 4th ed, (Oxford: Oxford University Press, 2006), p. 40.

⁶⁰ *Soering v. the United Kingdom*, Application No. 14038/88, 7th July, 1989, para 103. This case is considered in detail in Chapters Five and Six.

⁶¹ William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed, (Cambridge: Cambridge University Press, 2002), pp. 262-264.

protection of the Member State right to choose of whether or not to administer the punishment.

The drafters of the *Convention* ensured that the Member States had a wide freedom to choose penological sanctions. To facilitate this they sought a basic, restricted, articulation of rights.⁶² It is clear from the outset that the various drafting discussions could not accommodate all the necessary investigations to scrutinise fully how government policies and actions would affect each human right. A triage process was adopted to produce the *Convention* in an expedient manner. Teitgen stated:

[w]e should need years of mutual understanding, study, and collective experiments, even to attempt after many years, with any hope of success, to formulate a complete and general definition of all the freedoms and all the rights which Europe should confer on the Europeans. Let us therefore discard for the moment this desirable *maximum*. Failing this, however, let us be content with the *minimum* which we can achieve in a very short period, and which consists in defining the seven, eight or ten fundamental freedoms that are essential for a democratic way of life and which our countries should guarantee to all their people. It should be possible to achieve a common definition of these (emphasis added).⁶³

⁶² Gordon Weil, *The European Convention on Human Rights: Background, Development and Prospects*, (Leyden: Sythoff, 1963), p. 28.

⁶³ *TP*, 1, above, fn. 1, p. 44.

Maxwell-Fyfe affirmed that the *Convention* was needed to come into “existence reasonably soon,”⁶⁴ and Teitgen further emphasised “the current year is the critical year...we should do what we consider to be our duty towards Europe quickly, and we hope, effectively.”⁶⁵ However, the speed of the drafting debates did not allow for all the aspects of the rights to be discussed, and this included the compatibility of the right to life with the application of the death penalty.

The published *travaux préparatoires* demonstrate that the drafters were under pressure from governments not to infringe national sovereignty, although they were also aware that the very creation of the Council and the drafting of the *Convention* did produce some surrender of domestic rule. Teitgen recounted that it had been “pointed out to us that we must pay attention to state sovereignty,”⁶⁶ but Maxwell-Fyfe plainly stated to the drafting committee, “[l]ike all treaties, the proposed Convention would involve some voluntary surrender of sovereignty.”⁶⁷ Nevertheless, one clear position concerned the sovereign states’ right of the death penalty. If sovereignty was to be surrendered this was not to include the right to impose the punishment. Natural law arguments were used to support this approach.

Natural law was particularly important as a guiding methodology for the drafting process. Teitgen had argued, “who does not appreciate that these rights are fundamental, essential rights, and that there is no State which can, if it abuses them,

⁶⁴ *ibid*, TP, 1, p. 116.

⁶⁵ *ibid*, TP, 1, pp. 58-60.

⁶⁶ *ibid*, TP, 1, p. 294.

⁶⁷ *ibid*, TP, 1, p. 122.

claim to respect *natural law* and the fundamental principles of human dignity?” (emphasis added)⁶⁸ Teitgen proposed natural law as an unproblematic concept grounded in the Enlightenment realisation of the right to life (as identified above), and he attempted swiftly to establish the contribution of natural law in formulating the “minimum” standard of the definition of human rights when he stated in the drafting discussions:

[y]ou will allow me, I hope, not to enter into a philosophical discussion...but in my Report I touched on the principles of natural law. In the preamble, I preferred not to make any sort of definition of this natural law. It has a history as old as the world and as our civilisation; it is the natural law of Antigone; it is also that of Cicero...Then there is the natural law of Christianity and of humanism. These are the principles and ideals upon which our Statute is based.⁶⁹

This promotion of natural law did not allow for any debates on what it actually was, or what the drafters thought it was. But to be compatible with the above historical considerations, natural law had to have been interpreted as confirming the acceptance of the death penalty, and neither be applied to restrict nor reject it. Sophocles’s Ancient Greek theatrical tragedy, the *Antigone*, may be seen as providing the origin of natural law, includes the possibility of the death penalty in the dialogue between Ismene and Antigone. Ismene stated:

⁶⁸ *ibid*, TP, 1, pp. 268-70.

⁶⁹ *ibid*, TP, 2, p. 32.

[n]ow look at the two of us, left so alone
Think what a death we'll die, the worst of all
If we violate the laws and override
the fixed decree of the throne,
its power-We must be sensible,⁷⁰

Costas Douzinas, the scholar of legal theory, has offered a reading of *Antigone* which coincides with the presence of the death penalty in natural law, when he stated:

[i]f *Antigone* is the foundation of Western law and jurisprudence, her stone is a burial stone that both conceals and reveals the deathbound nature of legality. It is this sepulchral quality of law that makes Walter Benjamin say there is 'something rotten in law.'⁷¹

⁷⁰ *Antigone*, p. 62 in, Sophocles, *The Three Theban Plays*, (London: Penguin, 1948); and again, when Creon declares:

Imagine it: I caught her in naked rebellion
the traitor, the only one in the whole city
I'm not about to prove myself a liar
not to my people, no, I'm going to kill her
Creon, lines 730-734, p. 94.

⁷¹ Costas Douzinas, *Law Deathbound: Antigone and the Dialectics of Nomos and Thanatos*, p. 164, in Desmond Manderson (ed), *Courting Death: The Law of Morality*, (London: Pluto Press, 1999).

Douzinias's reference to Walter Benjamin's phrase explicitly connects natural law to the death penalty, as Benjamin had identified that it was the death penalty itself which revealed the rotten element in law. He stated, "an attack on capital punishment assails not legal measure, not laws, but law itself in its origin...in this very violence something rotten in law is revealed."⁷²

Furthermore, Teitgen's identification of the natural law of Christianity, may also be interpreted as accepting the death penalty. The punishment applied within Christianity is referred to above, and the French philosopher, Jacques Derrida has argued that "[u]p until the twenty-first century, almost without exception, the Catholic Church has been in favour of the death penalty,"⁷³ and that "the death penalty has always been the effect of an alliance between a religious message and the sovereignty of a state."⁷⁴

The drafters also did not provide any arguments that the punishment was *per se* incompatible with European humanism. The humanist, Cesare Beccaria, is renowned as the herald of the Enlightenment arguments against the death penalty but he also maintained, in an oft ignored passage by modern day abolitionists, that there is one exception where the death penalty may be applied, "when though deprived of his liberty, he has such power and connections as may endanger the security of the

⁷² Benjamin, above, fn. 58, p. 242.

⁷³ Jacques Derrida, 'Capital Punishment: Another "Temptation of Theodicy,"' p. 197, in Seyla Benhabib and Nancy Fraser (eds) *Pragmatism, Critique, Judgment: Essays for Richard J. Bernstein*, (Cambridge: The MIT Press, 2004).

⁷⁴ *ibid*, p. 200.

nation.”⁷⁵ As such, Beccaria was arguing that the death penalty can be limited to circumstances of national self-defence. Specifically engaging with Beccaria’s statement, Derrida went so far as to say, “when it is inspired by the logic of Beccaria, as is almost always the case, the abolitionist argumentation weakens itself,”⁷⁶ and that, “[c]an these lines not be read as one of the most effective pleas for the death penalty?”⁷⁷ Of this circumstance, Derrida stated further, “I will dare to say that the death penalty has always answered deeply ‘humanist’ pleas. This is how it is in European law.”⁷⁸

Derrida’s reference here applied to the *Convention* and it can be used to explain this particular historical application. He enables us to conclude that the drafters did not consider that humanistic arguments prevented the death penalty from being incorporated into the *Convention*. We can therefore identify that the drafters possessed little inclination to challenge the death penalty. It was accepted through 1950s interpretations of natural law, Christian natural law and humanism. The apparent anomaly of Cicero, mentioned above, was not adequately considered by the drafters and there are no published records to suggest that they specifically engaged with Cicero’s speeches. What then occurred was an acceptance of the death penalty within the drafting of Article 2(1).

⁷⁵ Beccaria, above, fn. 28, Chapter 28.

⁷⁶ Derrida, above, fn. 73, p. 206.

⁷⁷ *ibid*, p. 221.

⁷⁸ *ibid*.

2.3.2 Article 2(1) and the Death Penalty

From the very beginning of the drafting debates there was a conflict of opinion on how they should approach the question of the right to life. The civil lawyers argued for an *enumeration* of rights, but the common law lawyers stated that a *definition* of the extent of the right was necessary. Elizabeth Wicks has stated that this “disagreement may be in part a legacy of the different approaches to the common law and civil law systems.”⁷⁹ The debate resulted in a stalemate and two *Convention* drafts were then submitted to the Secretariat General.⁸⁰ Draft Alternative A presented an enumeration of rights,⁸¹ and Draft Alternative B provided a definition of rights.⁸² The right to life, and the death penalty as a possible infringement of this right, provides a good example of the friction between the two drafting techniques proposed and A.H. Robertson argued that the civil lawyers:

⁷⁹ Elizabeth Wicks, ‘The United Kingdom Government’s Perception of the European Convention on Human Rights at the Time of Entry,’ *P.L.* 438 (2000), p. 439.

⁸⁰ For the issue of the different drafting techniques, the Secretariat General stated “As regards the substance of the collective guarantee, the Assembly and its Legal Committee were faced with two problems: 1) the enumeration of the rights to be guaranteed, the list of rights to be covered by the guarantee system; 2) the definition of those rights in terms of extent and content, both nationally and internationally,” in the *Preparatory Report by the Secretariat General concerning a preliminary draft convention to provide a collective guarantee of human rights*, (Doc. B22), *TP*, 3, above, fn. 1, p. 6.

⁸¹ *ibid*, p. 312.

⁸² *ibid*, p. 320; *ibid*, *TP* 4, p. 16, states, “the Committee decided to submit both texts to the Committee of Ministers, without indicating its preference, since it was not able to decide unanimously in favour of one or other of these systems.”

were content to incorporate these words textually in the draft Convention. The common lawyers, on the other hand, thought that a statement of the ‘right to life,’ necessitated a statement of the circumstances in which someone may be legally deprived of his life.⁸³

The drafters adopted the *Universal Declaration of Human Rights* 1948 (hereinafter, “UDHR”)⁸⁴ as a template of the rights which they thought appropriate to discuss in the initial drafting quorum. Teitgen opened the first session and set out what he believed to be the most important rights for debate, and borrowing from the UDHR, identified ten initial “rights.”⁸⁵ The first proscribed ‘right’ was to “ensure...security of the person, in accordance with Articles 3-5, and 8 of the United Nations Declaration.”⁸⁶ Concerning the “right to life,” UDHR Article 3 stated, “Everyone has

⁸³ A.H. Robertson, *The European Convention for the Protection of Human Rights*, (1950) *B.Y.I.L.* 145, p. 151. As a result of this idiomatic conflict two drafts were finally sent to the Committee of Ministers, “Alternative A” provided an enumeration of rights, and “Alternative B” a definition, see *TP*, 3, above, fn. 1, p. 312, 320, and *ibid*, *TP*, 4, p. 10.

⁸⁴ GA Res. 217 A (III), UN Doc. A/810; A/RES/62/149, 76th Plenary Session, 18 December 2007.

⁸⁵ The ten rights were taken from the Universal Declaration of Human Rights. They were: a) security of the person; b) immunity from all arrest, detention or arbitrary exile; c) exemption from all slavery and servitude, and from all forced labour of discriminatory nature; d) freedom of speech and in general of the expression of opinion; e) freedom of religious belief, practice and teaching; f) freedom of association and meeting; g) natural rights appertaining to marriage, paternity and the family; h) inviolability of domicile; i) equality before the law; j) protection against all discrimination based on religion, race, national origin, profession of political opinion or other opinion, see, *TP*, 1, above, fn. 1, p. 160.

⁸⁶ *ibid*, p. 296.

the right to life, liberty and security of the person” but this was interpreted as not prohibiting the death penalty.⁸⁷

In Teitgen’s enumeration of rights, he did not explicitly use the words “right to life,” the “death penalty” or “capital punishment.” But concerning the possibility of the punishment, what occurred within the debates was a gradual move away from the *enumeration* of the right to life, to a *definition* of when the state may legally impose executions. As we will see, this shift in emphasis was predominantly guided by the delegates from the United Kingdom, and Wicks argues that the different drafting negotiators were “in no doubt about the strength of the feeling on the part of the United Kingdom,” and that the precise definitions were an “essential prerequisite to any Convention.”⁸⁸ The importance of this may be nuanced, but what was achieved was that the Member State right to choose whether or not to impose the death penalty, instead of being *implied* within the *Convention* text, was to be explicitly mandated.

The text first evolved towards a definition when the European Movement worded their *Draft European Convention on Human Rights*, Article 1 as, “[e]very state party to this Convention shall guarantee to all persons within its territory the following rights: a) Security of life and limb...”⁸⁹ “Security” did not yet represent a “right” to life, but merely, that the government should *secure* the life of its citizens.

⁸⁷ Schabas, above, fn. 61, p. 41.

⁸⁸ Wicks, above, fn. 79, p. 440.

⁸⁹ *Draft European Convention on Human Rights, Convention for the collective protection of individual rights and democratic liberties by the states, Members of the Council of Europe, and for the establishment of a European Court of Human Rights to ensure the observance of the Convention*, prepared by the European Movement, cited in *TP*, 1, above, fn. 1, p. 296.

Then in the United Nations drafting debates of the *International Covenant of Civil and Political Rights*, on 4 January 1950, the Secretary General received a report from the governments of Australia, Denmark, France, Lebanon and the United Kingdom. This report recommended that the Article on the right to life should include a textual explanation which more clearly defined the administration of the death penalty. The United Kingdom government presented this UN report to the *Convention* drafting meeting as a Working Paper. The provisions concerning the death penalty stated:

1. No one shall be deprived of his life intentionally.
2. There shall be no exception to this rule save where death results in those States where capital punishment is lawful, from the execution of such a penalty in accordance with the sentence of a court.⁹⁰

The United Kingdom proposal was an attempt to define when the right to life can be restricted and began to establish the parameters for state application of the punishment. The proposal can be read as identifying that the *language* of human rights should encompass an explicit mandate legitimising the state's choice over the use of the punishment. Furthermore, the declaration "in those States where capital punishment is lawful," endorsed the death penalty as ultimately a municipal issue.

The United Kingdom therefore confirmed that any new human rights discourse in 1950 could not override the state's internal monopoly over the legislation of capital crimes. Following further drafting discussions, this specific phrasing was modified by

⁹⁰ Annex II of the Report of the Commission, (E/1371), cited in *ibid*, TP 3, p. 158.

a subsequent United Kingdom proposal. However, the purpose of maintaining municipal authority remained unchanged as it stated:

[t]he Government of the United Kingdom desire that the Convention, which the present Committee have been asked to draft, should contain certain articles which appear in the text of the latest draft of the United Nations Convention of Human Rights...Article 5 of the latest version of the United Nations draft Covenant refers *to punishment of offenders including deprivation of life*. If the Committee should desire to include this article in the proposed new Convention, the United Kingdom desire that the text of it should be as follows:

1) No one shall be deprived of his life intentionally save in the execution of the sentence of a court following his conviction of a crime for which his penalty is defined by law (emphasis added).⁹¹

This new proposal confirmed the sovereign state's right to legislate capital crimes, but it removed the words "capital punishment" and "death" from the specific *Convention* draft. These words which were formally adequate descriptions identifying the punishment and its consequence were substituted. The *travaux préparatoires* do not explain why the phrases were changed and there are no specific records of any debates on whether the application of the death penalty was inconsistent with the formation of the *Convention* text.

⁹¹ *ibid*, p. 186.

Torkel Opsahl noted that the “United Kingdom proposal was not opposed and there are no signs that restrictions nor limitations on its use were intended or even discussed.”⁹² All we have is the tabled proposal and then the amended proposal. He further stated, “[i]f there was any discussion of what was intended [concerning the death penalty] the published *travaux préparatoires* reveal little of it.”⁹³ J.E.S. Fawcett has also confirmed “there is almost no reported discussion on the drafts.”⁹⁴

What the *travaux préparatoires* do chronicle are numerous side-comments related to the death penalty. These comments included the execution of the Greek philosopher, Socrates, discussed by Mr. Maccus, the Greek representative at the first session of the Consultative Assembly.⁹⁵ At the presentation of questions concerning Teitgen’s original report, what the *rapporteur* meant by “security of person” was not debated or whether an execution violated this “security.”⁹⁶ In the same debate the Turkish representative, Mr. Düsünsel, questioned the validity of “so-called popular courts condemning to death and executing deputies” and stated that this was a “travesty of justice.”⁹⁷ But these comments were not picked up as essential for formulating any specific debate on whether the death penalty was a possible violation of the text.

⁹² Torkel Opsahl, *The Right to Life*, p. 217, in R. St. J. Macdonald, (et al, ed) *The European System for the Protection of Human Rights*, (Dordrecht: Nijhoff, 1993).

⁹³ *ibid*, p. 208; see also, B.G. Ramcharan, (ed) *The Right to Life in International Law*, (Dordrecht: Martinus Nijhoff, 1985), pp. 57-61.

⁹⁴ J.E.S. Fawcett, *The Application of the European Convention on Human Rights*, (Oxford: Clarendon Press, 1987), p. 34.

⁹⁵ *TP*, 1, above, fn. 1, p. 108.

⁹⁶ *ibid*, p. 160.

⁹⁷ *ibid*, *TP*, 2, p. 30.

There are also no specific discussions dealing with the scope of the death penalty. In theory, even under the new *Convention* system of human rights, the punishment could be applied to any crimes which were legislated as a ‘capital crime.’ Brian Simpson argued, within his authoritative study on the *Convention*, that Article 2(1) “had nothing to say as to what crimes could be capitally punished.”⁹⁸ The drafters did not mention the mandatory or discretionary application of the punishment or whether it was appropriate for an appeals process to be guaranteed or whether capital laws could be retroactively applied.⁹⁹ Also no mention of whether human rights prohibit any specific execution method, including the guillotine, gas chamber, hanging or shooting. There was also no mention of whether clemency petitions should be guaranteed.¹⁰⁰

Furthermore, the subsequent fourteen proposals to amend Article 2 did not challenge the Member State right of the death penalty.¹⁰¹ Only four proposals considered Article 2 generally but did not refer to the punishment.¹⁰² In the subsequent proposed

⁹⁸ A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford: Oxford University Press, 2004), p. 876.

⁹⁹ Although following the retroactive application of the Nuremburg Charter in the sentencing of the defendants at the Nuremburg Tribunal, it cannot be stated that at this time the Convention would prevent retroactively applied death sentences, see Hans Kelsen, ‘Will the Judgment in the Nuremburg Trial Constitute a Precendent in International Law?’ 1 *Int. L. Q.* 153 (1947).

¹⁰⁰ See, Weil, above, fn. 62, p. 46.

¹⁰¹ See *TP*, 3, above, fn. 1, p. 190.

¹⁰² Luxembourg (A 783); Ireland (A 778) Ireland and Turkey (A 776) and Italy (A 786), see, Index of Amendments Proposed, (Doc A 795), *ibid*, p. 198.

drafts of the *Convention* text there were only small amendments shifting the right to life from a position of Article number 3 to number 2, and whether it should be all one sentence or include a subsection. However, the effect of the wording was left unchanged, and the final wording of Article 2(1) is:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

This is essentially the same mandate as provided in the final United Kingdom proposal. What is added is the right to life at the beginning of the Article, and the word "defined" is replaced by "provided" by law. Both adjectives appear to provide the same result as they confirm that a capital crime must be legislated in the civil codes and statutes, or be developed through the common law of Member States. It also provides that the death penalty must be "provided by law," and that a "court" only has competence to pass such a sentence. If these provisions were met, at this moment in European history the death penalty was an acceptable punishment by virtue of the specific wording of Article 2(1). We now consider how Article 3 was weighed within this acceptance of the punishment.

2.3.3 Article 3 and the Absence of the Death Penalty

Questions concerning the prohibition of torture and circumstances of inhuman or degrading treatment or punishment can be read as originally fused within Teitgen's

proposal of “[s]ecurity of life and limb.”¹⁰³ However, the two issues of the right to life and inhuman punishment, were separated in the *Convention* with Article 2(1) corresponding with UDHR Article 3. *Convention* Article 3, was then drafted independently to mirror UDHR Article 5, which stated, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” During the presentation of Article 3, a debate on the state imposition of “torture” occurred, and the United Kingdom representative, Mr. Cocks, argued:

[t]he Consultative Assembly takes this opportunity of declaring that all forms of physical torture, whether inflicted by the police, military authorities, members of private organisations or any other persons, are inconsistent with civilised society, are offences against heaven and humanity and must be prohibited. It declares that this prohibition must be absolute and that torture cannot be permitted for any purpose whatsoever, either for extracting evidence, to save life or even for the *safety of the state*. *The Assembly believes that it would be better even for society to perish than for it to permit this relic of barbarism to remain*¹⁰⁴ (emphasis added).

The United Kingdom proposed a recommendation that the article should be worded as, “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment

¹⁰³ *ibid*, TP, 1 p. 160.

¹⁰⁴ Proposal by Mr. Cocks, Doc. No. 113, in *ibid*, TP, 2, p. 36. Antonio Cassese stated, “Mr. Cocks emphasised that his proposals were intended as a barrier against a return to barbarism such as that experienced by Europe on account of Nazi atrocities,” in, *Prohibition of Torture and Inhuman or Degrading Treatment or Punishment*, pp. 227, in Macdonald, above, fn. 92.

or punishment.”¹⁰⁵ The wording was eventually modified to “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.”¹⁰⁶ The word “cruel” was removed but the *travaux préparatoires* do not explain why though Fawcett argued that it was a repetitive phrase next to “inhuman.”¹⁰⁷

The *travaux préparatoires* reveal little of the discussions concerning what categories of “punishment” may contravene this Article. Following Mr. Cocks’s submissions, the debates almost exclusively focused upon torture and inhuman or degrading treatment. As the drafters had accepted that the death penalty was included in Article 2(1), it appears they had not ventured to debate whether the prohibition against “inhuman punishment” should be interpreted to prohibit the application of executions in any way. It is argued that in 1950 Article 2(1) permitted the sovereign state choice of the death penalty to remain in the *Convention*, as long as it was applied within the confines of the rule of law and administered by an impartial court. However, under Article 3 at the time of the drafting of the *Convention* any possible scrutiny of the death penalty was unclear.

From the silence of the drafters on the issue, it appears that they did not address this human rights and penological conundrum. Either the drafters were not aware of the potential difficulties of reconciling Articles 2(1) and 3 or they were aware but did not know how to resolve any potential conflicts. Or, as detailed above, the two positions

¹⁰⁵ Amendments to Article 2 of the Recommendation of the Consultative Assembly proposed by the expert of the United Kingdom, Doc. A 798, *TP*, 3, above, fn. 1, p. 204.

¹⁰⁶ Draft Convention Appended to the Draft Report Doc. CM/WP 4 (50) 16, in *ibid*, *TP* 4, p. 218.

¹⁰⁷ See, Fawcett, above, fn. 94, p. 42.

provided under the two Articles were a demonstration of the purported “minimum” to be achieved, and not the “maximum” encompassing of all possible scenarios of Article 3 violations. What is evident is that the drafters were content to present the Articles as they were and leave any potential controversies for further resolution as Teitgen stated that complete interpretations of the Articles would need years of “mutual understanding, study and collective experiments.”¹⁰⁸

As this thesis reveals in Chapters Five and Six, the different organs of the Council have evolved their interpretation of both Articles 2(1) and 3 to severely restrict and renounce the death penalty. But at this time the punishment was not acknowledged to be a violation of the “right to life” or against the prohibition of “inhuman punishment,” and this would also include the application of the death penalty in times of emergency.

2.3.4 Article 15 and the Use of the Death Penalty in Times of Emergency

In situations which may be interpreted as constituting a political “emergency,” the states wanted to ensure that they could dictate their own actions, and derogate from the *Convention*. In the ‘Preliminary Draft Convention,’¹⁰⁹ Alternative A, which set out a definition of the rights did not include a derogation clause, but Alternative B which provided an enumeration of rights did. It stated:

¹⁰⁸ *TP*, 1, above, fn. 1, p. 44.

¹⁰⁹ Doc. CM/WP I (50) 14, in *ibid*, *TP* 3, p. 312.

[i]n time of war or other *public emergency threatening the interests of the people* a State may take measures derogating from its obligations under this Convention to the extent strictly limited by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law (emphasis added).

Alternative B provided for possible wide derogation. If the “interests of the people” are threatened, then the state may “take measures” against this threat. What the “interests” were may have been interpreted to encompass a wide variety of circumstances which the state could argue are emergency situations. However, the wording finally evolved into a more defined and restricted definition. In order to allow signatory states to derogate from the *Convention*, Article 15(1) provided:

[i]n time of war or other *public emergency threatening the life of the nation* any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law (emphasis added).

The inclusion of Article 15 goes to the root issue of legitimate state reactions against threats within, and from outside, its municipal jurisdiction, and must be seen as a manifestation of state control over life and death. Greer notes that “Article 15 is based on a presumption that the public interest in the preservation of ‘the life of the nation’ should take precedence over all but a handful of non-derogable rights whenever this

is ‘threatened’ by ‘war or other public emergency.’”¹¹⁰ Thurschwell argues that the state’s right to impose the death penalty “remains in reserve,” and that “here we see the fundamental connection between the practice of capital punishment and the ‘state of emergency.’”¹¹¹ When the state is threatened by emergency situations, such as war, it wants to reserve within its arsenal effective response. In 1949, such response must be interpreted to include the possibility to choose the death penalty.

However, Article 15 does place certain restrictions on Member State action in derogation. Specifically concerning the death penalty and inhuman punishment, Article 15(2) states that there can be “no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from [Article 3].” Both paragraphs 1 and 2 support the view that death sentences and executions can be legitimised as long as they comply with Articles 2(1) and 3. Hence no derogation may be made against war criminals facing a “court of law” and they cannot be executed by any extra-judicial means.

The emphasis of providing war criminals due process of law can be seen when the Director of the Penal Branch of the Legal Division of the British Control Commission argued for the observance of due process for war criminals, and stated, “[u]nder no circumstances will anyone be executed regarding whom there is any possible doubt.”¹¹² Article 15 is therefore vital to the analysis of whether the application of the

¹¹⁰ Greer, above, fn. 7, p. 180.

¹¹¹ Thurschwell, above, fn 33, p. 15.

¹¹² PRO/FO 1060/244: Confidential Draft from the Director, Penal Branch, to Mr. J.C. Piegrome, 27 February 1948. Subject: Executions, cited in Evans, above, fn. 42, p. 743.

death penalty, within emergency situations, was considered a legitimate state application of the punishment or an illegitimate one. The parameters set by Article 2(1) are extremely important for establishing legitimacy in the state application of the punishment in emergency situations.

Although the drafting debates record few specific discussions on the death penalty, we can point to many drafting discussions on the distinction in emergency situations between “reason of state” and state actions of “self-defence.”

In 1949-50 the drafters were still acutely aware of the need to protect against threats to peace and security in Europe. They were particularly concerned with attempts to distinguish between an illegitimate response and a legitimate response by the state. For them an illegitimate government action was what they termed “reason of state.”¹¹³ This was seen to occur when a government promoted totalitarian political ideologies, such as Nazism, Fascism or Communism, and cause mass human rights violations. Hence the drafters can be seen to attempt to mandate that it was not legitimate to expect European citizens to agree to laws which were destructive of their own life, liberty and property. This is reflective of the Enlightenment social contract theorists which argued that the modern European sovereign was created for the protection of the life of its citizens. Such totalitarian sentiments were in conflict with this political theory.

On 19 August 1949, Teitgen addressed the Consultative Assembly and identified that the first and prominent enemy of human rights derived from what he termed “reason

¹¹³ *TP*. 1, above, fn. 1, p. 38.

of state.” Arguing for the implicit promotion of the right to life within his view of natural law, he maintained, “every man, by reason of his origin, his nature and his destiny, has certain indefensible rights, against which no reason of state may prevail.”¹¹⁴ On 7 September 1949 Teitgen presented a report to the drafting committee and explained that “reason of state” occurred when:

[the state] intervenes to suppress to restrain and to limit these freedoms for...reasons of state; to protect itself according to political tendency which it represents, against an opposition which it considers dangerous; to destroy fundamental freedoms which it ought to make itself responsible for co-ordinating and guaranteeing, then it is against public interest if it intervenes. Then the laws which it passes are contrary to the principle of the international guarantee.¹¹⁵

Teitgen was attempting to identify human rights violations which appear to occur outside of any democratic, constitutional (legal), authority. However, what Teitgen and the drafters had not appeared to realise was that “reason of state” was achieved, through and implemented, by *law*. How this “reason of state” was created by the

¹¹⁴ *ibid.* Teitgen further stated, “I think we can now unanimously confront ‘reason of state.’ *TP* 1, p. 50; Later in the Committee on Legal and Administrative Questions, he reinforced his point by arguing that the *Convention* would provide, “protection against a possible return of those aggressions, made for reason of state,” *ibid*, *TP* 1, p. 292; . Marie-Benedict Dembour, argued that reason of state, “can all too easily become a pretext for ‘vicious’ actions” on the part of the state, in *Who Believes in Human Rights? Reflections on the European Convention*, (Cambridge: Cambridge University Press, 2006), p. 40.

¹¹⁵ *TP*. 1, above, fn. 1, p. 278.

National Party in Germany was through what Teitgen identified as the “doctrines of death.”¹¹⁶

This doctrine of death was manifest within the jurisprudence of the “suspension of the constitution”¹¹⁷ advanced by the German Professor of Public Law, Carl Schmitt. It is useful to engage with Schmitt’s theories as his theories were initially adopted by the Reich as a mechanism to formulate its Nazi agenda. However, the analysis of Schmitt is confined to aspects which are specifically relevant to the interpretation of the drafting of the *Convention*.¹¹⁸ The suspension of the constitution thus produces for Schmitt an “exceptional” circumstance which operated contrary to the norm of liberal constitutionalism: the orthodox liberal principles which promote democracy and the promotion of equality and the right to life. He grounded this theory within the application of Article 48 of the 1919 Weimar Constitution. He stated:

¹¹⁶ Teitgen stated, “Fascism and Hitlerism have unfortunately tainted European public opinion.

These doctrines of death have infiltrated into our countries. They have left their mark. They have poisoned certain sections of public opinion,” *ibid*, p. 40.

¹¹⁷ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, (trans: George Schwab) (Massachusetts: MIT Press, 1988), p. 7.

¹¹⁸ Carl Schmitt’s public law theories are resurfacing through legal and philosophical critique, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford: Stanford University Press, 1998); *ibid*, *State of Exception*, (Chicago: University of Chicago Press, 2005); Costas Douzinas, *Human Rights and Empire: The political philosophy of cosmopolitanism*, (London: Routledge-Cavendish, 2007); and Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics*, (Abington: Routledge-Cavendish, 2008), pp. 132, 143-144.

[a]ccording to Article 48 of the German Constitution of 1919, the exception is declared by the president of the Reich but is under the control of the parliament, the Reichstag, which can at any time demand its suspension. This provision corresponds to the development and practice of the liberal constitutional state, which attempts to repress the question of sovereignty by a division and mutual control of competences. But only the arrangement of the precondition that governs the invocation of exceptional powers corresponds to the liberal constitutional tendency, not the content of Article 48. Article 48 grants unlimited power.¹¹⁹

The granting of “unlimited power” was a dangerous situation which the new *Convention* human rights system attempted to curtail, because once the Reichstag suspends the constitution through the exception, there is no check on the Reich’s exercise of power. However, this jurisprudential problem was not resolved by the *Convention* drafters, and here we can identify a legislative deficiency through their refusal to delve into questions of political philosophy and legal theory. They had, in effect, rendered the state of exception being potentially unconfined by the *Convention*, because the exceptional circumstances were mandated by “law.”¹²⁰ Thus the death penalty in the state of exception, in theory, would not be a violation of Article 2(1) because it is imposed through capital laws, and such an argument would

¹¹⁹ Schmitt, above, fn. 117, p. 11.

¹²⁰ I am in agreement with Rainer Maria Kiesow, who argues that the exception itself is a legal act (and this would be consistent with Article 48), see, *Law and Life*, p. 251 in Andrew Norris (ed), *Politics, Metaphysics, and Death: Essays on Giorgio Agamben’s Homo Sacer*, (Durham: Duke University Press, 2005).

be in accord with Brian Simpson's observation that the under emergency circumstances death penalty could be potentially applied for any crimes at all.¹²¹

Article 48 of the Weimar Constitution was "law." The fundamental principle here is the presence of an apparent unfettered sovereign recourse to Article 48 "which can at any time" be resorted to, and Schmitt later confirmed, "[s]overeign is he who decides on the exception."¹²² The exception marks the locus of ultimate power within the state, and concerning law, "All law is situational law. The sovereign produces and guarantees the situation in its totality. He has the monopoly over this last decision."¹²³

Schmitt maintained that a "philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree,"¹²⁴ and that "in the exception the power of real life breaks through."¹²⁵ Derrida agreed that "no sovereignty [exists] without the right to the exception, without the right, Schmitt will say, to suspend the law,"¹²⁶ and that this "is how Schmitt defines the sovereign: the ability to decide the exception, and the right to suspend the law."¹²⁷ In his scholarship on the death penalty, Thurschwell has observed that the "resurgence of interest in the relationship between sovereignty and the rule of law has led to a re-engagement with Schmitt's theories," and that "this currently influential branch of

¹²¹ Simpson, above, fn. 98, p. 876.

¹²² Schmitt, above, fn. 117, p. 5.

¹²³ *ibid*, p. 13.

¹²⁴ *ibid*, p. 15.

¹²⁵ *ibid*.

¹²⁶ Derrida, above, fn. 73, p. 199.

¹²⁷ *ibid*, p. 201.

political philosophy necessarily passes through the question of the state's power to kill...capital punishment is highly relevant here.”¹²⁸

Therefore, if Schmitt is correct, it needs to be identified whether the drafters attempted to ensure that the state of exception was confined and repudiated. Or whether any prevention of the state of exception was possible at all? The Article 2(1) mandate may be read as an attempt to establish a prohibition against the sovereign Member States from stepping outside basic constitutional procedural safeguards before imposing a death penalty: which would include the requirement of a capital law and the imposition of that law by a competent court. As such it is argued that, although the drafters had not explicitly engaged with the issue, it would have been their sentiment that Article 2(1) would accept all death penalties.

Relevant to this position, Derrida has identified that this “sovereign exception, this absolute immunity, is something that many national laws and certain international law are tending, very laboriously and at the price of many contradictions, again to place in question.”¹²⁹ Although it was not stated in the drafting debates, it is argued that the drafters tried to call the state of exception, through the renunciation of reason of state, into question. But they were apparently unsure how to achieve this fully. So we return to the “minimal” requirement, and the need for future political experiments to achieve more thorough definitions.

¹²⁸ Thurschwell, above, fn. 33. p. 14, fn 38.

¹²⁹ Derrida, above, fn. 73, p. 210.

What we can ascertain through this above analysis is that the *Convention* did not renounce the sovereign right of the death penalty, but the drafters wanted to try to penetrate the sovereign right when it was interpreted as imposing executions outside of normal protections of liberal constitutionalism.

But even though the drafters wanted to penetrate this sovereign action, they appeared not to have adequately articulated how this was to occur under the *Convention*. The best we can identify, is that the drafters attempted to deal with this jurisprudential issue as a distinction between “reason of state” and state actions in “self-defence.”

In opposition to the liberal identification of illegitimate actions of “reason of state,” an action of state “self-defence” was recognised as both legitimate and necessary. The drafters considered it an essential component of the protection of human rights and a possible combat against “reason of state.” In the first session of the Consultative Assembly drafting debates, Mr. Maccus, the Greek representative, outlined the fundamental position of the state being able to defend itself legitimately. He argued:

[t]he freedom of Europe in general, both for the States which compose it and for the citizens who form those States, is dependent on their capacity to defend themselves...for freedom to exist there must be security...Otherwise freedom would perish in suicide.¹³⁰

then Maxwell-Fyfe agreed with Maccus and stated:

¹³⁰ *TP*, 1, above, fn. 1, p. 108.

[the *Convention*] provides a system of collective security against tyranny and oppression. It is not enough to possess freedom: positive action must be taken to defend it...by this Convention we give a warning, a challenge and a first counter-stroke to the intending tyrant.”¹³¹

These arguments in the Consultative Assembly must be understood in the light of the drafters’ concern about “reason of state.” As Maccus further maintained the “tyrannic acts of those who misuse power,” must be condemned and “when stating our rights, let us also state our duties; when proclaiming our freedom, let us also proclaim our will to defend and to safeguard it.”¹³² Maccus’ language possesses philosophical undertones when he speaks of the “duties” of the state and the need for the state to “defend” the rights of the citizens. This principle of political philosophy was affirmed as Teitgen argued, “[w]hen the state defines, organises, regulates and limits freedoms...in the interests of, and for the better insurance of, the general well-being, it is only fulfilling its duty. This is permissible: this is legitimate.”¹³³ Following the war, and during the administration of the executions of war criminals, the relationship of the death penalty with the state action of self-defence was a strong manifestation of the psychology of government at the time.

The traditional philosophical analysis of “defence” is located in the discourse on the sovereign’s right to punish the individual(s) in order to protect the majority, against individuals such as Benjamin’s “great criminal” who contests the state’s monopoly of

¹³¹ *ibid*, p. 120.

¹³² *ibid*, p. 110.

¹³³ *ibid*, p. 278.

legitimate physical force.¹³⁴ The limit question which reached the core of the self-defence of the state was utilitarian. A deontological human right became secondary to this consideration. In effect, the *Convention* drafters asked: *when the life of the state is threatened which should perish, the threatening individual(s) or the state?* Consequentially, *Convention* Article 15 allowed for the state to determine the answer to this question, and Article 2(1) allowed the governmental choice to include the possibility of the death penalty as an action of self-defence.

Here we may see how the *Convention* extends the principle of national defence under *Statute* Article 1(d), which states, “[m]atters relating to National Defence do not fall within the scope of the Council of Europe.” The *Convention* was being debated as war criminals had been and were being executed following the Nuremburg Tribunal and in numerous municipal courts around Europe.¹³⁵ In 1945, the *Charter of the Nuremburg Tribunal* accepted the death penalty as an appropriate punishment,¹³⁶ and numerous trials and executions of war criminals across Europe occurred. In 1946, the Supreme Court of Norway ruled in *Public Prosecutor v. Kling*,¹³⁷ that even though

¹³⁴ Benjamin, above, fn. 58, p. 241.

¹³⁵ For example, the execution of Marshal Pétain, the leader of the Vichy government in France for the collaboration with the Nazis, was discussed in, *Lehideux and Isorni v. France*, (55/1997/839/1045) 3 September 1998.

¹³⁶ The death penalty was included as an appropriate punishment within the *Charter of the Nuremburg Tribunal*, Article 27, which gave to the judges, “the right to impose...death or such other punishment as shall be determined...” *Charter of the International Military Tribunal*, 59 Stat. 1544, 82 U.N.T.S. 279 (1945).

¹³⁷ (1946) 13 Ann. Dig. 262 (Supreme Court, Norway), cited in William Schabas, *The Abolition of the Death Penalty in International Law*, 3rd Ed, (Cambridge: Cambridge University Press, 2002), p. 1

the death penalty was not applicable for ordinary crimes, international law allowed for the death penalty in times of war. In 1945-1946 the National Coalition for the Abolition of the Death Penalty, based in the United Kingdom, recorded that Norway, Denmark, Holland and Belgium reserved the death penalty for “the worst crimes of collaboration with the enemy.”¹³⁸ Such executions, according to Richard Evans, were “as much a means of public education in Germany as an instrument of justice in the world community.”¹³⁹

If the drafters of the *Convention* had attempted to place any infringement on the death penalty, this would have been politically dangerous considering the arguments of the need for executions. The military government in Germany argued forcefully for the use of the death penalty. The post-war arguments for the removal of the death penalty for ordinary crimes in the United Kingdom (which forms the subject of the next chapter), were not welcomed by the military who argued that the punishment was required in the occupied zone and that the, “[m]ilitary government [in the British Zone of Germany] may be expected to react strongly against any proposal to abolish the death penalty in the zone.”¹⁴⁰

¹³⁸ *Annual Report of the National Council for the Abolition of the Death Penalty, 1945-46* (NCADP, 1946), p. 4.

¹³⁹ Evans, above, fn. 42, p. 742-743.

¹⁴⁰ *Germany-Death Penalty*, memo of 7 December, 1947, p. 2, PRO/FO 937/156, cited in *ibid*, p. 742.

Articles 2(1) and 3 may then be viewed as expressing a specific political sentimentality¹⁴¹ or psychology following the war. In the drafting debates Maxwell-Fyfe noted, that it is “the eternal truth which we must all remember; that barbarism is never behind us, it is underneath us.”¹⁴² Teitgen categorically confirmed, “[d]oes this mean...that today after victory, all danger is henceforth banished? Allow me to say that we do not think so.”¹⁴³ He further asked “[c]an we possibly remain indifferent in the face of the memories of such a recent past and the knowledge of such a sanguinary present?”¹⁴⁴ In this period of European history, the predominant political sentimentality was that the state needed to be continually prepared for such danger, and to combat such dangers with the possibility of the sovereign state’s right to choose whether or not to impose the death penalty. The original *Convention* text did not take this “right” away.

2.4 Conclusion

This chapter engages with various historical and political processes which allowed for the acceptance of the death penalty in 1949 within both the *Statute* and the *Convention*. This right of the death penalty was encompassed within Articles 2(1), 3 and 15, and it was therefore not determined to be a *per se* violation of the right to life,

¹⁴¹ Richard Rorty has also argued for the use of sentimentality in creating the boundaries of human rights, see, ‘Human Rights, Rationality, and Sentimentality’, in Shute, S. and Hurley, S (ed) *On Human Rights: The Oxford Amnesty Lectures 1993*, (New York: Basic Books, 1993)

¹⁴² *TP 2*, above, fn. 1, p. 42.

¹⁴³ *ibid*, p. 40.

¹⁴⁴ *ibid*, p. 64.

or to be an inhuman punishment. Also in emergency situations, as long as it was pronounced by an impartial court of law, it was legitimate. The historical records and political and philosophical readings of the formulation of the *Convention* provided in this chapter demonstrate that the sovereign right of the punishment was protected and not renounced. However, this observation may be placed within its historical context, and we will see that the European political sentiments and the evolution of *Convention* human rights will renounce the punishment. But it is not an unproblematical story, as the intricate sovereign state's right of the death penalty established in this chapter will be a continuous issue which the Council and its organs will grapple with.

The next issue to consider is how this argument is to be placed within the renunciation of the punishment for ordinary crimes in Western Europe by 1981. The fundamental issue will be to determine whether the states chose to remove the punishment themselves, or whether the *Convention* can be interpreted to have played a role in this penological change.

Chapter Three:
The Renunciation of the Death Penalty by
Western European States

3. The Renunciation of the Death Penalty in Western Europe

3.1 Introduction

By 1981 the Western European states had renounced the death penalty for ordinary crimes.¹ A penological evolution had occurred and for the first time a uniform geopolitical position against the punishment was witnessed. This chapter aims to investigate the extent to which the *Convention*, which had come into force in 1953,² can be seen to contribute to this penal change. In order to achieve this, the humanism and natural rights within the text, the specific legal provisions of Article 2(1) and 3, and also the mechanism of allowing individual petition before the European Commission of Human Rights and European Court of Human Rights, will be considered.³

It will be investigated whether the theories of the state monopoly over penal decisions, and/or natural law and humanism, outlined in the previous chapter, had

¹ Some countries had reserved the punishment for crimes against the state, for example, treason.

Also, Belgium maintained the death penalty for ordinary crimes but it was not applied and its application fell into disuse. Belgium finally abolished the punishment in 1996.

² The *Convention* came into force on 3 September 1953 with the ratifications of Germany, Iceland, Ireland, Luxembourg, Norway, Sweden and the United Kingdom.

³ The European Commission of Human Rights was included within the original *Convention*, Article 25, and the European Court of Human Rights within Article 46. In 1998 Protocol No. 11 discontinued the Commission and all applicants are heard by the Court.

an impact on the governments finally choosing to discontinue the punishment. There are two predominant schools of thought which demonstrate how the death penalty was removed; firstly, that it was a policy consideration based upon utilitarian arguments, and secondly, that the punishment was a violation of humanistic sentiments. Both arguments are put forward, but a third reading is proposed which seeks to determine the extent to which the *Convention* contributed to this change. It will be investigated whether the human rights document can be seen to have had an explicit impact or whether it had minimal effect, with the humanism interwoven within the text producing the hegemonic discourse.

As such, the main aim of the chapter is to discover the reasons for the penological change. In this respect it considers the contribution to the change by the collection of comparative materials from countries which had removed the punishment, the change in governmental policy on the deterrent effect of the punishment, the demise of the acceptance of the death penalty as a form of retribution, the possibility of the execution of innocent people, the perceived phenomenon that the punishment brutalizes society, and the search for a humane execution method. In the final section, the significance of the acceptance by the United Kingdom and France to the *Convention* enforcement mechanisms is considered. It is analysed whether they allowed the *Convention* to have direct application in order to scrutinise their capital judicial systems.

3.2 The Removal of the Death Penalty in Western Europe

It is difficult to pinpoint a general penological theory to suggest why the death penalty was renounced within Western Europe by 1981. In his extensive research for the United Nations, Roger Hood noted that “there has been no one pattern.”⁴ He pointed to various methods being reflected with some countries abandoning the death penalty in one political act when new regimes came into power, and other countries going through a process of restriction, moratoria and final abolition.⁵ William Schabas is in agreement when he stated, “[t]here are many paths to abolition...There appears to be no formula to follow as each country finds its own path.”⁶

The countries which had removed the death penalty for ordinary crimes had restricted the scope of the death penalty by reserving it for possible application in times of war or for other crimes which may be described as being against the state, e.g., treason, were the Netherlands, who had removed the death penalty for ordinary crimes in 1870, and in Norway (1905), Sweden (1921), Iceland (1928), Denmark (1933), Switzerland (1942), West Germany (1949), Italy (1947), Finland (1949), and Austria (1950). Of these nine countries, seven were original signatories of the European Convention,⁷ and these countries could be regarded as developing an alternative European penological discourse.

⁴ Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3rd Ed, (Oxford: Oxford University Press, 2002), p. 25.

⁵ *ibid*, p. 24.

⁶ William A. Schabas, ‘International Law, Politics, Diplomacy and the Abolition of the Death Penalty,’ 13 *Wm & Mary Bill Rts J*, (2004), 417, p. 444.

⁷ The seven countries who had removed the death penalty for ordinary crimes, and who were original signatories of the European Convention were: Denmark, West Germany, Iceland, Italy,

Following the adoption of the *Convention*, Belgium, France, Luxembourg, Portugal, Spain, and the United Kingdom were the final countries which retained the death penalty in Western Europe. In identifying a penological genealogy of the renunciation of the death penalty in Western Europe by 1981, Belgium and Luxembourg may be viewed as an anomaly.⁸ There had been no executions in Belgium since 1950 and even though the punishment was available the courts did not impose it and the final removal of the punishment from the criminal statutes was in 1996. In Luxembourg the death penalty was also reserved for ordinary crimes, but it was not applied at all and finally abolished in 1979. Belgium's capital laws had fallen into disuse and thus the epoch of no executions for ordinary crimes in Western Europe in 1981, is maintained.

There had not been any executions in Portugal since 1867 and the punishment was only available under military law and for crimes against the state between 1867 and 1976.⁹ The British Foreign Office attempted to obtain information for the British

the Netherlands, Norway, and Sweden. Each of the countries had ratified the *Convention* in 1953, and it came into force that year, except for the Netherlands who submitted their ratification in 1954, and Italy who submitted its ratification in 1955.

⁸ Belgium had ratified the *Convention* in 1955 and Luxembourg in 1953. See also, Marc Ancel, 'The Problem of the Death Penalty,' p. 10, in, Thorsten Sellin, (ed) *Capital Punishment*, (New York: Harper and Row, 1967); For Belgium's non-application of the death penalty, see, *Report of the Royal Commission on Capital Punishment, 1949-1953*, (London: HMSO 1953), Appendix 13: Extenuating Circumstances in Belgium and the Union of South Africa, pp. 475-481.

⁹ Peter Hodgkinson and Andrew Rutherford, *Capital Punishment: Global Issues and Prospects*, (Winchester: Waterside Press, 1996), p. 206.

Select Committee on Capital Punishment in 1930, on the abolition process in Portugal, but did not receive any.¹⁰ Furthermore in his research on the death penalty in Europe, Arthur Koestler simply says that no statistics were available for Portugal.¹¹ In its report on the death penalty in 1989, Amnesty International recorded the 1976 adoption of the new Portuguese Constitution, Article 25(1) states “Human life is inviolable,” and (2) “In no case will there be the death penalty.”¹² In this year Portugal signed the Convention and in 1978 posted its ratification. In response to my question of whether he thought that the *Convention* contributed to the abolition of the death penalty in Portugal at any stage, Raquel Vaz-Pinto from the Catholic University of Portugal replied that the *Convention* “had no influence on the abolition of the death penalty in Portugal” and that up until 1976:

the military death penalty was only maintained after World War One by the dictatorship...The total abolition in 1976 was, in a way, a continuation of a

¹⁰ The Foreign Office stated in a memorandum that it did, “not anticipate that the Portuguese Government will be in a position to furnish any statistics or other information of value, since the capital penalty was abolished in Portugal in the middle of last century and the question seems to arouse little interest,” in *Report of the Select Committee of Capital Punishment, 1930* (London: HMSO, 1930), p. 603 (hereinafter, “SCCP”); see also, E. Roy Calvert, *The Death Penalty Enquiry: The Evidence Reviewed*, (London: Gollancz, 1931), pp. 36-37.

¹¹ Arthur Koestler, *Reflections on Hanging*, (London: Gollancz, 1956), p. 172. In my communications with Roger Hood on the availability of information for Spain and Portugal, he stated that there is no new evidence except for the abolition dates. Email communication 20th January 2008.

¹² Amnesty International, *When the State Kills... The Death Penalty: A Human Rights Issue*, (New York: Amnesty International, 1989) p. 193.

process which was ‘interrupted’ by Salazar. In fact, there was not much discussion and all of it went back to the arguments in the nineteenth century.¹³

There is a similar scholarship lacuna for Spain which removed the death penalty from its statutes in 1978 following the fall of the Franco regime.¹⁴ Eric Prokosch, the Amnesty International expert on the death penalty, noted that following the removal of the death penalty in 1932, it was reinstated in 1938 under the Franco regime, and that “Spain’s last executions date to September 17, 1975, when five men were executed by firing squad.”¹⁵ Spain’s adoption of the *Convention* similarly followed Portugal’s, in that it posted its signature in 1977, and then ratified it two years later in 1979.

In the United Kingdom, the death penalty was suspended in 1965,¹⁶ and formally removed from the statute books in 1969 for ordinary crimes. This was introduced

¹³ Information from an email communication by Dr. Raquel Vaz-Pinto, Institute for Political Studies, Catholic University of Portugal, Palma de Cima, January 23rd 2008.

¹⁴ Roger Hood, *The Death Penalty: A Worldwide Perspective: A Report to the United Nations Committee on Crime Prevention and Control*, (Oxford: Clarendon Press, 1989) p. 9; see also, *La pena de muerte y su abolición en España* (Los Libros de la Catarata, 1995). This book was edited by Amnesty International, Spanish Section, Madrid. It includes essays on the death penalty in wartime, a study of the death penalty in Spain in the 17th and 18th centuries, and an account of Amnesty International’s campaign for the abolition of the death penalty under the Spanish military penal code.

¹⁵ Eric Prokosch, ‘Death Penalty Developments,’ p. 67, in William A. Schabas, *The International Sourcebook on Capital Punishment: 1997 Edition*, (Boston: Northeastern University Press, 1997).

¹⁶ Murder (Abolition of Death Penalty) Act 1965.

under a new Labour government. The removal followed intense campaigning from anti-death penalty organisations and individual politicians from a variety of political parties.¹⁷

France abandoned the death penalty four years after the execution of Hamida Djandoubi in 1977, and his was the final execution in Western Europe.¹⁸ The death penalty was included in the Criminal Code of 1810, but when François Mitterrand came into power he appointed Robert Badinter as Minister of Justice, who is an ardent abolitionist, and the death penalty was removed by the French National Assembly in 1981.¹⁹ France had been one of the original signatory states to the *Convention* in 1950, but it had not ratified the text until 1974. With the United Kingdom, it imposed executions for ordinary crimes after ratification.

It therefore took 111 years from the Netherlands in 1870 to France, in 1981, for Western Europe to join together in this penological change and renounce, or *de facto* abolish the death penalty for ordinary crimes. In attempt to understand the reason(s) for this development, five key factors present themselves. These are considered in the following sections.

3.3 The Comparison of the Capital Judicial Systems

¹⁷ The political debates are discussed below.

¹⁸ Michel Forst, *The Abolition of the Death Penalty in France*, p. 112, in Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Publishing, 1999).

¹⁹ Hood, above, fn. 4, p. 25.

One of the main mechanisms which the anti-death penalty movement deployed to refute the government arguments on the effectiveness of the death penalty was the accumulation, and reliance on comparative materials which outlined various country's experiences with the failure of the death penalty to demonstrate any special deterrent quality, that it is impossible to ensure that innocent people are not executed, that the punishment produces a demonstrable brutalizing of society, and that execution methods are inhumane.

This material contributed to an increase of the transparency of the British and French capital judicial systems: it provided support for arguments against the governmental practice.²⁰ As the United Kingdom and France, leading up to the removal of the death penalty, went through a period of intense public and political debates, the arguments generated from comparative material became a tool for the anti-death penalty movements. Most of the available scholarship is from Britain and France, but we can identify comparable material from earlier studies and see how they became beneficial for the anti-death penalty strategies.

²⁰ The significance here is not so relevant for Portugal and Spain as they applied the death penalty under dictatorship rule, which vehemently protected their internal jurisdictions, so the comparative material could be argued to have had limited effect under the closed governmental systems of Spain and Portugal. What was required for the abolition of the punishment was a regime change, and following the removal of Salazar and Franco, the death penalty was removed in a single event in both countries. See, Franklin Zimring, *The Contradictions of American Capital Punishment*, (New York: Oxford University Press, 2003), p. 23.

The Howard League for Penal Reform conducted a limited study on Northern Europe in 1928.²¹ The 1930 Select Committee on Capital Punishment conducted a more extensive study and considered its primary task as being that “it might most carefully investigate all the facts and figures relative to the abolition of capital punishment in various countries of the world.”²² However, after World War Two interrupted the process of collation of materials, there was renewed vigour in Switzerland, the UK and France.

From 1946, Professor Jean Graven sought to unite the European anti-death penalty movement and form a research institute in Switzerland at the University of Geneva. The first International Congress on Social Defence met in San Remo in 1946 and Graven, as *rapporteur* to the Congress, outlined the aims as *inter alia* the “progressive abolition of the death penalty.”²³ The Congress provided impetus for the International Centre for Criminological Studies at Geneva, and Graven set up a program of data collection from legal academics and sociologists.²⁴

²¹ S. Margery Fry (ed), *The Abolition of the Death Penalty in Holland and Scandinavia*, 2nd Ed, (London: the Howard League for Penal Reform, 1928).

²² SCCP, above, fn. 10, p. lxvii.

²³ James Avery Joyce, *The Right to Life: A Worldview of Capital Punishment*, (London: Victor Gollancz Ltd, 1962), p. 99 Albert Camus noted that Graven argued in a law journal that the European anti-death penalty advocates “must not rely on the old arguments, but on present day application,” in ‘Reflections on the Guillotine,’ in, *Resistance, Rebellion and Death*, (New York: Vintage Books, 1998), p. 174.

²⁴ Jean Graven, *New Reflections on the Death Penalty*, (Institute of Comparative Law, University of Paris, 1961), reviewed in the postscript in Joyce, *ibid*.

After giving evidence to the Royal Commission on Capital Punishment in 1949-53, Lord Templewood reiterated that what was needed was a “study of the lessons to be derived from the experiences of other countries where the death penalty has been abolished,”²⁵ and that the arguments supplied by the abolitionist countries “needs to be repeated over and over again.”²⁶ H.L.A. Hart, the Oxford jurist, engaged with all of the above reports²⁷ and stated that in 1953, the discussions on the death penalty had “introduced altogether new standards of clarity and relevance into discussions of a subject which had too often been obscured by ignorance and prejudice.”²⁸ A symposium in Paris organised by Arthur Koestler and Albert Camus in 1957, entitled “Reflections on Capital Punishment,”²⁹ provided a further platform for discussions. Arthur Koestler confirmed that by 1956, the comparative evidence presented by the Select Committee and the Royal Commission was “summarized with previously unequalled thoroughness.”³⁰ In affirmation, Franklin Zimring has

²⁵ Lord Templewood, *The Shadow of the Gallows: The Case Against Capital Punishment*, (London: Victor Gollancz Ltd, 1951), p. 13.

²⁶ *ibid*, p. 85.

²⁷ H.L.A. Hart, ‘Murder and the Principles of Punishment: England and the United States,’ p. 55, in, *ibid*, *Punishment and Responsibility: Essays in the Philosophy of Law*, (Oxford: Clarendon Press, 1970).

²⁸ *ibid*, p. 58.

²⁹ The symposium resulted in the publication, Arthur Koestler and Albert Camus, *Reflections sur la peine Capitale*, (Calmann-Levy, 1957), cited in Albert Camus, *Reflections on the Guillotine*, p. 175 in *Resistance, Rebellion, and Death*, (trans: Justin O’Brien) (New York: Vintage International, 1988).

³⁰ Arthur Koestler, *Reflections on Hanging*, (London: Victor Gollancz, Ltd, 1956), p. 60.

argued that the “Royal Commission’s report...was the launching pad for rethinking capital punishment throughout the developed world.”³¹

What is significant is that the compilation of evidence from different governments, was demonstrating that firstly, those countries which had removed the death penalty for ordinary crimes had come to the conclusion that it was no longer a legitimate punishment for ordinary crimes, and secondly, they were providing this information for implicit challenges to retentionist countries. In effect, what we witness is a growing challenge to the right of municipal governments to the monopoly of internal jurisdiction.

This challenge to the sovereignty of internal jurisdiction can be seen in the debates within the United Kingdom. In the political debates the government was fighting back. Sir John Anderson, Permanent Under Secretary of State of the Home Office, stated that the evidence supplied by countries which had removed the death penalty would not be of particular use because, “it is doubtful whether, if complete statistics could be obtained, they would be of any use for the purpose of this present inquiry.”³² Such attempts to thwart politically the value of the material for the British judicial system appeared to have been successful as Koestler noted “we have heard very little of the evidence that these countries have made available. In the Parliamentary debates, foreign comparisons were either ignored or regarded as inapplicable to our own case.”³³ Christopher Hollis, a British M.P., stated in 1953,

³¹ Zimring, above, fn, 5, p. 20.

³² SCCP, above, fn, 10, Minutes, p. 32.

³³ Koestler, above, fn. 30, p. 80.

that in the political debates on the death penalty in Parliament that, “it is an astonishment to me how infrequently”³⁴ the experiences of foreign countries are considered. The British government had attempted to protect its right to impose the death penalty as a manifestation of its municipal, internal, penal policy. Such internal jurisdiction, did not have to comply with, or even consider, the experiences of other countries.

In France in the 1970s, Michel Foucault, joined the anti-death penalty campaign demanding that the arguments in France reflect modern European sentimentalities.³⁵ Foucault made allusions to the fact that France was only just “catching-up” with the rest of Western European removal of the punishment. He stated, “[t]he oldest penalty in the world is in the process of dying in France...It is a catching-up....We are now trying to conform ourselves to the average profile.”³⁶ Comparative abolition rates were the measure for Foucault’s analysis and the consensus was almost complete. Foucault’s observation of the death penalty being the “oldest penalty” brings us back to the acceptance of the punishment at the creation of the Council,

³⁴ Christopher Hollis, *Epilogue*, p. 261, in R.T. Paget and S.S. Silverman, *Hanged-And Innocent?* (London: Victor Gollancz Ltd, 1953).

³⁵ See, Anne Ferrazzini and Michel Forst, ‘Abolition in France,’ pp. 191-198, in Council of Europe, *Death Penalty – Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004); Jon Yorke, ‘Blanchot, Foucault, Levinas and Derrida: French Philosophy and the Deconstruction of the Death Penalty,’ 13 *Amicus Journal* (2005) 28, p. 30-33.

³⁶ Michel Foucault, ‘Against Replacement Penalties,’ in James D. Faubion (ed), *Michel Foucault, Power: Essential Works of Foucault, 1954-1984*, vol. 3, (London: Penguin, 1994), p. 459.

but that by 1981 the profile or common heritage of Europe had completely evolved and France was to change with it.

Abolition in Western Europe took 36 years to complete after World War Two. James Megivern noted, “[t]he old argument used to justify the theoretical legitimacy of the state’s right to execute continued to be repeated by defenders of capital punishment, but it would never sound the same after Hitler.”³⁷ What had occurred was a gradual turning away from the state’s right to impose the punishment, and the length of time of 36 years was an incredibly short time for abolition when one considers the vast history of the punishment within this region. Carole Steiker has recognised the acceptance of arguments following the war when she observed, “Europeans and others who have recently and vividly experienced terrible abuses of state power may see more reasons to remove the death penalty from the state’s arsenal of sanctions.”³⁸

Gradually, each government, from Northern Europe through the rest of Western Europe, accepted that it no longer had the right to impose the punishment. The comparative materials aided in this change in penology. We now consider the specific arguments which contributed to this change.

³⁷ James Megivern, *The Death Penalty: An Historical and Theological Survey*, (New York: Paulist Press, 1997), p. 282.

³⁸ Carol S. Steiker, ‘Capital Punishment and American Exceptionalism,’ in, Michael Ignatieff, (ed) *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005), p. 83.

3.4 The Death Penalty and the Special Deterrence Claim

There is scholarly agreement that in this period the essential question revolved around the defence of the state or rebuttal of the utilitarian notion that the punishment possessed a unique deterrent quality. Christopher Hollis argued that “the whole case stands or falls” on whether the death penalty was a deterrent or not.³⁹ Hart affirmed:

[i]n any public discussion of this subject the question that is likely to be the central one is ‘What is the character and weight of the evidence that the death penalty is required for the protection of society? What is the evidence that it has a uniquely deterrent force compared with the alternative of imprisonment?...we should consider what is implied if this question is treated – as undoubtedly most ordinary men now treat it – as the root of the matter, as the fundamental question in considering whether the death penalty should be abolished or retained.’⁴⁰

Hart’s argument is a recollection of what was heralded across Western Europe. In 1928 the Howard League for Penal Reform compiled comparative municipal data from European governments who had removed the death penalty, which appeared to indicate that the evidence collated could not by itself, “prove either the utility or futility of Capital Punishment as a deterrent,” but that “we can obtain evidence of probability, almost amounting to proof, that its abolition does not permanently raise

³⁹ Hollis, above, fn. 34, p. 259.

⁴⁰ Hart, above, fn. 27, p. 71.

[the murder rate].”⁴¹ Carl Torp, Professor of Penal Law at the University of Copenhagen, succinctly stated that in Denmark, the absence of the death penalty had “not in any way contributed to an increase in the number of such crimes which were formally punished by death.”⁴² In Holland, Dr. J. Simon Van der Aa, pointed out that, “since the abolition of capital punishment, the number of life sentences passed has shown a tendency to diminish.”⁴³ Victor Almquist, the Head of the Swedish Prison Administration, argued that “[t]he reduction in the number of capital sentences and the final abolition of the penalty so far from leading to an increase of offences of this kind was actually followed by a noticeable decrease in crimes legally punishable by death.”⁴⁴

The Select Committee on Capital Punishment in 1930 continued to present evidence to renounce the unique deterrent claim. It cited, Professor Herbert Speyer of the University of Brussels, who stated, “in Belgium the infliction of the death penalty is not necessary for the protection of society and the reduction of crime.”⁴⁵ Similarly the Belgium Minister of Justice said, “[i]t seems inconceivable that a Minister of Justice should ever think it possible to re-establish a penalty the uselessness of which, to put it no higher, has been amply demonstrated.”⁴⁶ The Danish government

⁴¹ Fry, above, fn. 21, p. 4. Also, in 1831 Jeremy Bentham had argued that the death penalty was “inefficient” and questioned its deterrent value, see, *To His Fellow Citizens of France on Death Punishment*, (London: Robert Heward, 1831).

⁴² Carl Torp, ‘The Abolition of Capital Punishment in Denmark,’ in *ibid*, Fry, p. 5.

⁴³ J. Simon van der Aa, ‘The Abolition of Capital Punishment in Holland,’ p. 8, in, *ibid*.

⁴⁴ Victor Almquist, ‘The Abolition of Capital Punishment in Sweden,’ p. 15, in *ibid*.

⁴⁵ SCCP, above, fn. 10, p. 257.

⁴⁶ *ibid*, p. 353.

stated, “it seems unnecessary to propose the retention of capital punishment for the sake of public security.”⁴⁷ Sweden confirmed, “the state did not require the death penalty for its protection,” and that this “hitherto had not been contradicted by experience.”⁴⁸ The Select Committee reviewed this evidence and concluded that “capital punishment may be abolished in [Britain] without endangering life or property, or impairing the security of society.”⁴⁹ This comparative material was thus interpreted to provide evidence that the utilitarian arguments of deterrence had not any provable special application.

The conclusions of the Royal Commission on Capital Punishment in 1953 were essentially the same, although more cautiously expressed. Their terms of reference via the Royal Warrant prevented them from considering the question whether capital punishment should be abolished or not; they were only allowed to make recommendations concerning changes in existing capital law.⁵⁰ Professor Thorsten Sellin from the University of Pennsylvania, who was an authority on the death penalty and interpreting statistics on its deterrent value, gave evidence to the Royal Commission. He stated that it was impossible to draw any inferences, “that there is any relationship...between a large number of executions, small number of executions, continuous executions, no executions, and what happens to the murder rates.”⁵¹

⁴⁷ *ibid.*

⁴⁸ *ibid.*, p. 358.

⁴⁹ *ibid.*, p. xcvi.

⁵⁰ The Royal Warrant is reproduced in RCCP, above, fn. 8, pp. iii-iv.

⁵¹ *ibid.*, p. 22.

Following Sellin's testimony, the Royal Commission on Capital Punishment concluded that, "there is no clear evidence in any of the figures we have examined that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall,"⁵² and that, "[w]e recognise that it is impossible to arrive confidently at firm conclusions about the deterrent effect of the death penalty."⁵³

The European governmental statements demonstrated the failure of the death penalty to have any special or significant deterrent value. This was a collective turning away from the sovereign's sanguine "common heritage" identified in Chapter Two, and moving towards an acceptance that the death penalty was no longer to be viewed as an effective and efficient penological tool. Indeed, Lord Templewood reviewed the evidence presented by the various foreign governments to the Royal Commission on Capital Punishment, and stated that the "conclusion seems to be inescapable that, whatever may be argued to the contrary, the existence of the death penalty makes little or no difference to the security of life."⁵⁴

This utilitarian calculation on whether the death penalty provided a beneficial penal policy for the protection of society was perhaps the most important issue for European governments at this time. The arguments put forward by the abolitionists became more scientific, and they can be seen as juxtaposed with, or even, elevated

⁵² *ibid*, p. 23.

⁵³ *ibid*, p. 24.

⁵⁴ Templewood, above, fn. 25, p. 85.

above, the traditional arguments based upon humanitarian grounds. Koestler is illuminating here:

[t]o give it a fair hearing, we must set all humanitarian considerations and charitable feelings aside, and examine the effectiveness of the gallows as a deterrent to potential murderers from a coldly practical, purely utilitarian point of view...it will be seen that the theory of hanging as the best deterrent can be refuted on its own purely utilitarian grounds, without calling ethics and charity to aid.⁵⁵

Koestler here is isolating the humanistic standards in order to focus upon rebutting the death penalty under policy considerations. But he was aware of the humanistic arguments, he just considered that the policy attacks were a more fruitful line of critique. In agreement, Elizabeth Tuttle, in her detailed study on the campaign against the death penalty in Britain, noted that in this period humanitarian considerations were present, but that the driving force for abolition was provided through policy calculations. She stated:

[s]ince abolition was delayed, the movement had to become more modern and scientific. Reformers began to base many of their arguments on sociological and psychological data. Although abolitionists still argued from a moral and humanitarian basis in the twentieth century, they also set out to prove

⁵⁵ Koestler, above, fn. 30, p. 53.

objectively and scientifically that the abolition of capital punishment would be advantageous to the nation.⁵⁶

It is argued that both the policy and the humanitarian arguments were deployed in juxtaposition. Each complemented the other. However, as argued in Chapter Two, the relationship of the sovereign state and the death penalty, was ultimately manifested during this period, and so the application of the relationship needs to be deconstructed. Even with the arguments that the punishment was not now required for society's protection, even after World War Two, the governments began to accept it was losing its utilitarian value. The sentiments expressed to the Select Committee and the Royal Commission, were now being repeated.

As such the confirmation that the punishment was now not necessary for the protection of society, was a policy reason for the governments to relinquish the penalty. However, it would be accurate to state that this reason for abolition was contingent upon peace and the absence of threats to society: as detailed in the previous chapter. As Europe became more peaceful following the war, this argument was holding up. Consequentially, this policy argument was the one which opened the door for abolitionists: as was argued by Northern European countries and it percolated through Western Europe. Because the punishment lost its utility, the governments would now entertain arguments based upon humanitarian grounds.

⁵⁶ Elizabeth Orman Tuttle, *The Crusade Against Capital Punishment in Great Britain*, (London: Stevens and Sons, 1961), p. 144.

The humanitarian arguments provided extra confirmation for the European governments. This is why, even if the policy considerations were considered to be the most important considerations, the abolitionists still referred to the natural law and humanistic positions. Koestler refers to the importance of the “period of the Enlightenment” for him and his abolitionist colleagues.⁵⁷ Leslie Hale considered the humanism of Voltaire,⁵⁸ Michel Foucault was heavily influenced by Jean-Jacques Rousseau⁵⁹ and Albert Camus affirmed that:

[h]ow can European society of the mid-century survive unless it decides to defend individuals by every means against the state’s oppression? [and as a consequence] ...we cannot be too wary of the humanitarian ideology in dealing with a problem such as the death penalty.⁶⁰

Camus has it just right. The humanistic arguments must be included for adequate understanding of this period. Indeed, even though the policy arguments can be viewed as prominent, the humanistic theories were required for the deployment of “every means against” the punishment. As such, the analysis which follows concerns policy and humanistic arguments within: (a) the possible execution of

⁵⁷ Koestler, above, fn. 30, p. 22. Koestler refers to Beccaria, Montesquieu and Voltaire. Also, Arthur Koestler and C.H. Rolph, who observed that “Beccaria’s teaching gained a profound influence over Europe, from Russia to France, from Sweden to Italy,” in *Hanged by the Neck*, (Hammondsworth: Penguin, 1961), p. 51.

⁵⁸ Leslie Hale, *Hanged in Error*, (London: Penguin, 1961), p. 13.

⁵⁹ See, Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (London: Penguin, 1976), p. 90.

⁶⁰ Camus, above, fn. 29, pp. 228, 230.

innocent people; (b) the renunciation of the retributive theory; (c) the extent to which the punishment causes a brutalization of society, and; (d) the failure of the search for a humane way to execute people.

3.5 The Possible Execution of Innocent People

For some abolitionists in this period, the possibility of innocent people being executed in Europe went to the root of the question of the effectiveness of the capital justice system. Before 1981, the arguments focused on the practical failure of the system rather than of the need to protect a possible “right” to “life” of the innocent person. Arthur Koestler neatly sums up the arguments of 1950s Europe. These included; (a) those who say hanging an innocent person doesn’t really matter; (b) those who say that the risk of hanging an innocent person is so small that it must be accepted; and (c) that judicial error is inherent – so the abolition of the death penalty is imperative.⁶¹ Koestler made this observation in 1956, three years after the *Convention* came into force, but he does not base his considerations upon human rights, including a specific “right to life.” What Koestler was demonstrating was that the anti-death penalty discourse of this period attempted to situate the execution of the innocent within a practical failure of the capital judicial system and not a question of human rights but as a means of “justice” within humanitarian principles.

The possibility of innocent people being executed had been a troubling issue for the Select Committee on Capital Punishment. It gave thorough attention to the debates,

⁶¹ Koestler, above, fn. 30, p. 110.

and concluded that “the evidence before the Committee was unable completely to dispel these disquieting and awful considerations.”⁶² Sir Herbert Samuel aptly summarised the position when he stated, “I do not think that we can ever say that no innocent man has been executed for murder in the past, nor can we have an absolute assurance that no innocent man will be convicted and executed in the future.”⁶³ The Solicitor’s Journal in 1930 stated that if the infallibility of the justice system was “essential to the case in favour of Capital Punishment that no mistake can possibly be made, Capital Punishment stands condemned.”⁶⁴ Lafayette famously said in the French Assembly, “I shall ask for the abolition of the punishment of death until I have the infallibility of human judgment demonstrated to me,”⁶⁵ and Roy Calvert, similarly identified, “no human institution is infallible, and that we have no right to inflict a penalty which is completely irrevocable.”⁶⁶ Lord Shaw of Dunfermline articulated, “[e]very human judgment is mingled with human error, and in the issues of life and death no judge should be charged with an irreparable doom.”⁶⁷

⁶² SCCP, above, fn, 10, p. xlix.

⁶³ *ibid.*

⁶⁴ *The Solicitor’s Journal*, 4th January, 1930, cited in *ibid*, p. 1.

⁶⁵ Statement in the French Chamber of Deputies, August 1930, cited in *ibid*, p. 222. In the 1928 Howard League Report, Denmark similarly stated, “the now commonly accepted view that capital punishment is irreparable,” and that “later it may be discovered that sentence was passed unjustly,” *ibid*, p. 6.

⁶⁶ Evidence on behalf of the National Council for the Abolition of the Death Penalty, *ibid*, p. 147.

⁶⁷ *ibid*, p. xlix.

As such the anti-death penalty arguments were used to attack the death penalty from a principled position: the state is responsible for the protection of the life of its citizens, and such executions would be antithetical to this aim. However, there have been arguments which claim that even if innocent people were executed, this was not *in-and-of-itself* a reason for discontinuing the punishment. The Select Committee recorded Archbishop Paley's crude statement that, "he who falls by a mistaken sentence may be considered as falling for his country."⁶⁸ Paley wanted to ensure that the equilibrium of society was maintained, and even innocent people being executed did not constitute an appropriate circumstance to disrupt society's balance. This was also the position put forward by Maurice Hamblin Smith in evidence to the Select Committee. He stated, "I think the possibility of a man being wrongly hanged is not of sufficient moment to weigh against Capital Punishment...If you really thought it the best form of deterrent, then I would not allow the possibility of the occasional execution of an innocent man to stand in the way."⁶⁹ For Hamblin Smith, the determination of "innocence" as a measure of effective penal policy, was only a "means" to demonstrate the legitimacy of the punishment, and not an "end" with which to call for its abolition.

Of course, the former United States President, Benjamin Franklin would have disagreed entirely, when he stated in a letter to Benjamin Vaughan in 1785, that, "it is better 100 guilty persons should escape than that one innocent person should

⁶⁸ Paley's Works, 1825, vol II, "Crimes and Punishments," p. 388, cited in *ibid*, p. 1.

⁶⁹ *ibid*, p. li.

suffer.”⁷⁰ Hart had also argued against the execution of innocent people based upon utilitarian grounds. His position clearly refutes the claims by Paley and Hamblin Smith, when he observed, “[t]he state of general alarm and terror which might arise in society if it were known that the innocent were likely to be seized and subjected to the pains of punishment in order to serve the needs of society might be worse than any advance in security or social welfare brought about by these means could outweigh.”⁷¹

European history records many probable miscarriages of justice.⁷² There are cases in different European countries where people have been found guilty of murder, and after spending long prison terms had their cases overturned. These include, the Austrian case of Leopold Hilsner who was found guilty of murder in Vienna in 1910 and his conviction was quashed eighteen years later in 1928. In Holland, a Mr. Tuennisen and Mr. Klundert, were convicted of murder in 1923 and found to be innocent in 1929. In Hungary the case of Steven Tonga, who was hanged in 1913 for the murder of his daughter, was subsequently found innocent after the discovery of his daughter’s suicide note.⁷³ In both England and France highly publicised cases of the execution of possible innocent people questioned the efficacy of the judicial systems. The British conviction and execution of Timothy John Evans was subject

⁷⁰ See, *Letter to Benjamin Vaughan*, of 14 March 1785, p. 443 in Benjamin Franklin, Works, vol. VIII, cited in *ibid*.

⁷¹ Hart, above, fn. 27, p. 76.

⁷² See, Templewood, above, fn. 25, pp. 66-7; and Koestler, above, fn. 30, pp. 109-138.

⁷³ *ibid*, Templewood, p. 66-7.

to intense political and media debate.⁷⁴ Following the denial for reprieve from the Home Secretary, Chuter Ede, Evans was executed on November 8, 1949 for the death of his wife. Evans had confessed to the killing but there was doubt concerning his mental state. Then in 1953, the bodies of six women were found in the house and grounds of 10 Rillington Place, where Evans had lived, but another occupant of the house, John Reginald Halliday Christie, was charged with their murders and he confessed. They were all found to have been strangled, and then Christie confessed to killing Evans's wife. This confession resulted in a call for an investigation into Evans's execution.⁷⁵

⁷⁴ Timothy Evan's execution was heavily debated in the House of Commons, and numerous books and chapter sin books critique the case including, R.T. Paget and S.S. Silverman, *Hanged-And Innocent*; Michael Eddowes, *The Man on Your Conscience*, (London: Cassells, 1955); Leslie Hale, *Hanged in Error*, (London: Penguin, 1961); Ludovic Kennedy, *Ten Rillington Place*, (London: Gollancz, 1961) and the film *10 Rillington Place* was inspired by Kennedy's written account.

⁷⁵ It is interesting to note that Sir John Anderson gave evidence on the appropriateness of the Home Secretary giving reasons for granting reprieve to a condemned prisoner to the Select Committee on Capital Punishment and stated that there may be a type of case where, "though a man had been rightly convicted on the evidence, there remained what had been called a "scintilla of doubt": he had in mind a case of a man who had been convicted mainly on the evidence of another person with criminal antecedents, who undoubtedly was the man who committed the crime if the accused man was innocent. If in such a case there was a risk that later it might transpire that the other person was the guilty man, "the Home Secretary would not be justified in exposing the whole system of capital punishment to that risk, but such an explanation could never be given in public," Royal Commission on Capital Punishment, above, fn. 8, p. 211.

The Home Secretary at the time was Sir David Maxwell-Fyfe, the same person who was prominent in the drafting of the *Convention* as Chairman of the Committee on Legal and Administrative Questions. As has been discussed in Chapter Two, the *travaux préparatoires* do not reveal any detailed discussion on the legitimacy of the death penalty, but Maxwell-Fyfe's statements on his opinion on the punishment in the House of Commons are recorded in Hansard. Not only did Maxwell-Fyfe engage in the debates surrounding the question of Evans's innocence, but before this debate he had made his opinions known in 1948 when he responded to a question on the possibility of innocent people being executed in England. He stated:

[a]s a realist I do not believe that the chances of error in a murder case, with these various instruments of the State present, constitute a factor which we must consider...Of course, a jury might go wrong, the Court of Appeal might go wrong, as might the House of Lords and the Home Secretary: they might all be stricken mad and go wrong. But that is not a possibility which anyone can consider likely. The honourable and learned member is moving in a realm of fantasy when he makes that suggestion.⁷⁶

This statement provides an insight into his high opinions of the capital judicial process and what possible credence he would have given in the *Convention* drafting debates to anyone who would have made the claim that innocent people are executed in Europe. Maxwell-Fyfe, as the British Home Secretary, attempted to

⁷⁶ *Parliamentary Debates, Hansard*, HC, 14 April, 1948, Official Report, vol. 449, col. 1077.

sweep under the political carpet the question of Evans's innocence.⁷⁷ He appointed Mr. J. Scott Henderson, Q.C., to chair an inquiry into Evans's case.⁷⁸ Sydney Silverman M.P. had called for a full public hearing into the case,⁷⁹ but Maxwell-Fyfe ordered that the inquiry should be private. It took only twelve days from the beginning of hearing evidence to the publication of the Report, and Henderson concluded that the case presented at Evans's trial was an overwhelming one, and that Christie's confession was unreliable and untrue.⁸⁰ However, seven years later, the former Home Secretary, Chuter Ede, stated in the 1955 debate on the death penalty that:

I was the Home Secretary who wrote on Evan's papers, "The law must take its course." I never said, in 1948, that a mistake was impossible. I think Evans's case shows, in spite of all that has been done since, that a mistake was possible, and that, in the form in which the verdict was actually given on a particular case, a mistake was made. I hope that no future Home Secretary, while in office or after he has left office, will ever have to feel that although he

⁷⁷ In commenting on Sir David Maxwell-Fyfe's actions, Leslie Hale stated, "[t]he fact that an error cannot be rectified instead of putting the authorities on their guard against the hideous possibility of hanging an innocent man rather seems to drive them to incredible lengths in order to deny and to keep from the public the idea that a mistake can happen," in above, fn. 58, p. 10.

⁷⁸ Mr. J. Scott Henderson, *Report of an inquiry into certain matters arising out of the deaths of Mrs. Beryl Evans and Geraldine Evans and out of the Conviction of Timothy Evans for the murder of Geraldine Evans*, Command Paper, 8896 (London: HMSO, 1953).

⁷⁹ *Parliamentary Debates*, above, fn. 76, 1 July 1953, vol. 517, col. 410.

⁸⁰ Henderson, above, fn. 78, paragraph 49.

did his best and no one could accuse him of being either careless or inefficient, he sent a man to the gallows who was not “Guilty as charged.”⁸¹

The fundamental issue in the British Parliamentary debates on the death penalty was the efficacy of the judicial system, in that even with the greatest efforts to guarantee due process, innocent people can still be judicially killed. This case would have demonstrated a clear breach of Evans’s “right to life” under Article 2(1) of the *Convention*. Maxwell-Fyfe would have been fully aware of what Article 2(1) stated when he discussed Evans’s case, but there was no admission by him, or claim by any other Member of Parliament, that his “human rights” may have been violated if he was indeed innocent.

A further example of a possible violation of Article 2(1) can be seen in France in the case of Christian Ranucci who was executed on July 28, 1976. During a 24 hour interrogation, Ranucci confessed to the murder of Marie-Dolorès Rambla, but then later retracted his statement. In 1978, the French Lawyer, Jean-Denis Bredin asked Gilles Perrault to investigate Ranucci’s case and Perrault published his findings in the book *Le Pull-over Rouge* (The Red Sweater).⁸² Foucault took issue with the

⁸¹ *Parliamentary Debates*, above, fn. 76, 10 February 10, 1955, vol. 536, col. 2084; see the appeal for the posthumous overturning of Bentley’s sentence in, *R. v. Bentley (Deceased)* [2001] 1 Cr,App.R. 21. Lord Bingham stated, “The Court had come to the decision that the summing up as a whole had been such as to deny the applicant a fair trial which is the birthright of every British citizen.”

⁸² Michel Foucault wrote a book review of *Le Pull-over Rouge*, entitled, ‘The Proper Use of Criminals,’ in James D. Faubion (ed), *Michel Foucault, Power: Essential Works of Foucault, 1954-1984*, vol. 3, (London: Penguin, 1994), pp. 429-434.

process obtaining the confession. In his usual probing rhetoric he claimed that the criminal justice system did not want to get to the bottom of the case, but that the “cult of the confession” drained the legal system of wanting to ensure that the truth of the case was discovered.⁸³

Hence the investigatory deficiencies rendered the possibility of innocent people being executed. Ranucci’s final words to his lawyer before he was executed was “clear my name.”⁸⁴ Perrault’s book was made into a film of the same name, *Le Pull-over Rouge*,⁸⁵ and the public sentiment created by these media accounts were still present when in 1981, President Francois Mitterrand removed the death penalty for ordinary crimes. But Ranucci’s lawyers had not brought a claim that his death violated Article 2(1), even though they thought he was innocent, and also, in his analysis of the case, Foucault did not claim that his death was a violation of the right to life under the *Convention*.

There is therefore some significant evidence to demonstrate that during the British and French executions post 1953, even when the innocence of the convict was maintained, those arguing the cause did not rely on the new human rights standards, but upon challenges to the efficacy of the capital judicial system as a whole.

⁸³ Foucault, *The Proper Use of Criminals*, p. 429, in Faubion, *ibid*.

⁸⁴ See, ‘Lid Lifted on Links in Infamous French Serial Killer Case,’ New Zealand Herald, http://subs.nzherald.co.nz/author/story.cfm?a_id=173&ObjectID=10366059 (last visited, January 4, 2007).

⁸⁵ *Le Pull-over Rouge* (1979) directed by Michel Drach.

3.6 The Theory of Retribution

Retribution as a legitimate reason for the death penalty is traditionally grounded in a proportionality analysis. The father of this penological assessment was Immanuel Kant who argued that, in the formulation of his *lex talionis*, if an individual had “committed murder, he must die. In this case, no possible substitute can satisfy justice...This equality of punishments is therefore possible only if the judge passes the death sentence in accordance with the strict law of retribution.”⁸⁶ Kant’s formulae would *prima facie* be most cogently legitimated through the executions of war criminals. However, during, and immediately following World War Two, the retributive function of punishment in killing war criminals was being questioned.

In 1948, the British Control Commission, based in occupied Germany, noted, “[t]here is a strong possibility that before long a great deal of attention is likely to be focused on our executions at Hameln.”⁸⁷ In the House of Lords debates, Lord Douglas of Kirtleside, said that he had as Military Governor in Germany, dealt with

⁸⁶ Immanuel Kant, ‘The Metaphysics of Morals,’ p. 156, in H. S. Reiss (ed) *Kant: Political Writings*, (Cambridge: Cambridge University Press, 1970). The Royal Commission on Capital Punishment noted that the traditional interpretation of retribution as a principle of punishment, can be divided into the theories of “vengeance” and “reprobation.” Vengeance is normally attributed to the *individual’s* desire to be avenged and the state thus imposes revenge through punishment. Reprobation occurs when the *state* does not accept the breaking of its laws by imposing a punishment which is proportionate to the gravity of the crime, RCCP, above, fn. 8, p. 17.

⁸⁷ Confidential Draft from the Director, Penal Branch, to Mr. J.C. Piegrome, 27 February, 1948. Subject: Executions: PRO/FO 1060/244, cited in Richard Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600-1987* (London: Penguin, 1997) p. 743.

hundreds of death sentences and “became sickened with the magnitude of the legal slaughter.”⁸⁸ This uneasiness expressed was also affirmed by the US Commander in Germany, General Lucius D. Clay, who noted:

[a]s a result of delays in review, stay of sentence pending possible appeal to the Supreme Court...there are now in excess of five hundred awaiting execution...I find it difficult to adjust my own mental processes to requiring what looks to be almost a mass execution of more than five hundred persons. I believe it also gives an appearance of cruelty to the United States even though there is no question in my mind that the crimes committed fully justify the death sentence.⁸⁹

Clay proposed that these sentences be commuted to life imprisonment “in substantial measure.”⁹⁰ His observations challenged the *prima facie* legitimate post-war use of the death penalty. The main argument was that the application of retribution had “an appearance of cruelty.” The “eye-for-an-eye” proportional principle of punishment, did not have the same legitimacy following the war. The “old argument” as identified by Megivern above, was falling from grace. Here we find that the municipal governments were turning their back on retribution as a legitimate reason to impose the death penalty. Germany provides a good example. Evans suggests that retribution:

⁸⁸ Templewood, above, fn, 25, p. 128.

⁸⁹ Jean Edward Smith (ed), *The Papers of General Lucius D. Clay: Germany 1945-1949*, (Bloomington, Indiana, 1974), pp. 658-59, cited in Evans, above, fn. 87, p. 745.

⁹⁰ *ibid.*

had a venerable biblical and above all philosophical tradition, incorporated in the writings of Immanuel Kant...the problem with this argument is that there is no obvious reason why the retributive principle should apply to murder and to no other crime.⁹¹

Germany refuted the retribution argument partly because of the post-war acceptance of its impractical application. Later in Britain, Koestler and Rolph argued “we do not commit indecent assault on men convicted of indecent assault, or burn down the house of a person convicted of arson.”⁹² So Kant’s proportionality analysis was found deficient.⁹³

Furthermore, Lord Templewood had stated to the Royal Commission on Capital Punishment that, “the reforming element has come to predominate.”⁹⁴ Here we see that the traditional appeals to the humanitarian notions of civilized society were also present. Although Sir John Anderson did not argue for the removal of the death penalty, his testimony clearly demonstrates a renunciation of retribution when he

⁹¹ *ibid.*, p. 907.

⁹² Arthur Koestler and C.H. Rolph, above, fn. 57, p. 143.

⁹³ Jacques Derrida made a specific criticism of Kant’s *lex talionis* and how it applied to the death penalty, and he stated, “Kant fails, in my view...to produce a principle of equivalence, and therefore of calculability,” in ‘Capital Punishment: Another “Temptation of Theodicy,”’ p. 209, in Seyla Benhabib and Nancy Fraser, (ed) *Pragmatism, Critique, Judgment: Essays for Richard J. Bernstein*, (Cambridge: The MIT Press, 2004).

⁹⁴ RCCP, above, fn. 8, p. 17.

stated, “[t]here is no longer in our regard of the criminal law any recognition of such primitive conceptions as...retribution.”⁹⁵ Sir Herbert Samuel similarly stated:

I do not hold the view...that a murderer ought to be put to death simply as retribution for his crime, that what he has done to some member of society, society ought to do to him by way of retribution. I do not think that that is an attitude which a civilised community should take or that we ought to base our system of justice on tit for tat.⁹⁶

The governments were accepting that retribution failed on purely practical reasons in that it fails on proportionality grounds, but the humanitarian arguments were still stated and so are to be seen as supporting, or being part of, the practical and policy reasons for the failure of retribution as a legitimate reason for the continuation of the punishment. Retribution as a penal ideology did not promote the sentiment following the war of the promotion of a civilised society, and also it was considered that the death penalty was also thought to “brutalise” society.

3.7 The Death Penalty as a Means of Brutalization of Society

The renunciation of retribution as an official state policy also has pedagogical functions as it reduces the manifestation of societal vengeance and anger, and contributes to the promotion of a “civilised” and more peaceful way of life. It

⁹⁵ *ibid.*

⁹⁶ SCCP, above, fn. 10, Evidence, p. 2348.

should be conceded that this position is difficult to prove empirically, but the vast amount of the argument during this period demonstrates that it was a generally accepted phenomenon.

Viktor Almquist, the Chief of the General Administration of Prisons in Sweden, stated to the Select Committee in 1930, “[t]he retention of Capital Punishment seems not to be in accord with the best interests of civilised society.”⁹⁷ The Select Committee plainly concluded that the death penalty has a “brutalising effect on the population at large.”⁹⁸ Lord Buckmaster argued that the effect of the publications of executions in the British press caused a “most demoralising influence,” but he could not condone a limitation on the publications because the public had a right to know what went on.⁹⁹ Roy Calvert told the Select Committee that there was a “degree of morbid sensationalism” with regards to executions, “which would have been absolutely nonexistent if capital punishment had been abolished.”¹⁰⁰ Furthermore, the Howard League for Penal Reform Memorandum stated:

⁹⁷ *ibid*, p. 495.

⁹⁸ *ibid*, p. xx. Thomas Paine noted that the death penalty was a “sanguine punishment that corrupts mankind,” in Thomas Paine, *The Rights of Man*, p. 213, in Michael Foot and Isaac Kramnick (eds), *Thomas Paine Reader*, (London: Penguin Books, 1987). For the brutalizing effect of the death penalty in the United States see, William C. Bailey, *Murder, Capital Punishment and Deterrence: A Review of the Literature*, p. 154-5, in Hugo Adam Bedau, *The Death Penalty in America: Current Controversies*, (New York: Oxford University Press, 1997).

⁹⁹ SCCP, above, fn. 10, Evidence, para. 4651.

¹⁰⁰ *ibid*, para. 1768.

[t]he existence of the death penalty throws a glamour over murder trials, enlists public sympathy on the side of the murderer, and engenders a morbid interest in crime, especially on the part of the less stable-minded members of the community. This concentration of thought on the evil things of life, induced each time there is an execution, is bound to have evil consequences on the mental and moral life of many individuals and on society as a whole. At the worst it induces imitative crime.¹⁰¹

The media coverage of the death penalty reveals inherent paradoxes concerning the legitimacy of the punishment. In 1953, the investigations into the possible brutalising effect of the punishment were not included in the Royal Warrant for the Royal Commission on Capital Punishment, but it did note that when executions were in public before 1868 that “though the publicity was deterrent in intention...became in practice a degrading form of popular entertainment, which could serve only to deprave the minds of the spectators.”¹⁰² Lord Templewood

¹⁰¹ *ibid*, Memorandum.

¹⁰² The Royal Commission cited an unspecified report from the Home Office, RCCP, above, fn. 8, p. 246. See also, Charles Dickens similarly observed, “I observe the strange fascination which everything connected with this punishment, or the object of it, possesses tens of thousands of decent, virtuous, well-conducted people who are quite unable to resist the published portraits, letters, anecdotes, smilings, snuff-takings of the bloodiest and most unnatural scoundrel with the gallows before him. I observe that this strange interest does not prevail to anything like the same degree where death is not the penalty,” Charles Dickens to Macey Napier, July 28, 1845, in, Mamie Dickens and Georgina Hogarth (eds), *The Letters of Charles Dickens*, vol. III (London: Chapman and Hall, 1882), pp. 79-80, cited in Tuttle, p. 14; and Pieter Spirenborg, *The Spectacle of Suffering: Executions and the Evolution of Repression*, (Cambridge: Cambridge University Press, 1984).

confirmed that the “talk of the taking of human life convinces me that the publicity given to atrocities in the Press, on films, and in the Nuremberg trials has had the exact opposite of the effect that was intended, and has lowered rather than raised civilized standards.”¹⁰³ Similarly, of the death penalty in Germany, Hans-Heinrich Jesch ck argued that the punishment “can even be a psychological stimulus of crimes of violence.”¹⁰⁴

This brutalising effect was also recorded in France. The well-known history of the efforts of Dr. Joseph Ignace Guillotin, to apply medical science to end executions by mutilation, and substitute it with the more “humane” method of beheading, has been scrutinised and Guillotin’s efforts are now considered to have been misguided.¹⁰⁵ The last public execution in France took place with the death of Eug ne Weidmann, on June 17, 1939. Weidmann was beheaded outside the prison Saint-Pierre in Versailles, and the body was photographed and the pictures appeared in the *Paris-Soir*. Camus stated that the government took the “publicity very badly and protested that the press had tried to satisfy the sadistic instincts of its readers.”¹⁰⁶ But the outbursts by spectators were considered so scandalous that French President Albert

¹⁰³ Templewood, above, fn. 25, pp. 11-12.

¹⁰⁴ Hans-Heinrich Jescheck, ‘Modern Criminal Policy in the Federal Republic of Germany and the German Democratic Republic,’ p. 511, in Roger Hood (ed), *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz*, (London: Heinemann, 1974).

¹⁰⁵ See, James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between American and Europe*, (New York: Oxford University Press, 2003) p. 110; and for a biography of Dr. Guillotin, see, Andr  Soubiran, *The Good Doctor Guillotin and His Strange Device*, (trans: Malcolm MacCraw) (London: Souvenir Press, 1964).

¹⁰⁶ Camus, above, fn. 29, p. 180.

Lebrun immediately banned all future public executions. Camus argued that the death penalty “besmirches society,”¹⁰⁷ and that “publicity [of executions] not only arouses sadistic instincts with incalculable repercussions eventually leading to another murder; it also runs the risk of provoking revolt and disgust in the public opinion.”¹⁰⁸

These arguments focused on demonstrating to governments that if they allow the administration of the death penalty a brutalising effect of society occurs, and as such they are not fulfilling their legitimate role applying effective and efficient penal policies. However, it must be observed that while it appeared more clearly demonstrated that the punishment possessed no special deterrent effect, these arguments were *prima facie* based upon social observations and phenomena: the effect of executions may have a damaging psychological influence on society. From the reactions of governments, witness testimony and academic observations, it appears that this argument had significant political weight.

¹⁰⁷ *ibid*, p. 205.

¹⁰⁸ *ibid*, p. 187. Furthermore, Violet van der Elst recounts the execution of a man known as Russmusen in Denmark in 1887. Russmusen was to be beheaded by the axe of the executioner. However, the executioner missed his neck and imbedded the blade in his shoulder which caused a violent scene of secreting blood and Russmusen screaming in pain. The second attempt hit his shoulder again, and the further violent scene caused the crowd to panic. The third blow finally cut off Russmusen’s head. The public outcry against the atrocity caused by the botched execution, resulted in King Christian IX of Denmark immediately renouncing the death penalty, and he ordered that all capital criminals be given clemency and serve prison terms, in *On the Gallows*, (London: The Doge Press, 1937), pp. 249-50.

3.8 Methods of Execution

The next issue to consider in the dismantling of the death penalty in Europe is the investigation into the different methods of execution. While Britain, France, and Spain, still imposed executions within the normal criminal law following the war, the question arose as to whether there was a “humane” way of executing a person, or whether it was merely a matter of finding the method which was the “most humane.”

In 1953 the Royal Commission set three criteria to assess execution methods; “humanity,” “certainty” and “decency.”¹⁰⁹ The requirements of “humanity” were divided into two; firstly that, “the preliminaries to the act of execution should be as quick and as simple as possible, and free from anything that unnecessarily sharpens the poignancy of the prisoner’s apprehension.”¹¹⁰ Secondly that, “the act of execution should produce immediate unconsciousness passing quickly into death.”¹¹¹ The issue of “certainty” was to consider “which method is most likely to avoid mishaps, due either to the complexity of the machinery or to an error of the executioner.”¹¹² Finally, “decency” in the execution was thought to be recognised through two circumstances: firstly, that the “civilised state [should] conduct its judicial executions with decorum,” and secondly, that “judicial executions should be

¹⁰⁹ RCCP, above, fn. 8, p. 248.

¹¹⁰ *ibid*, p. 253.

¹¹¹ *ibid*.

¹¹² *ibid*, p. 255.

performed without brutality, that it should avoid gross physical violence and should not mutilate or distort the body.”¹¹³

Of the methods of execution in operation in 1950s Europe, it was noted that the guillotine was the method in France and Belgium, and that hanging was in use in England and Scotland.¹¹⁴ The use of the guillotine was quickly relegated as barbaric to English sentiments as the Royal Commission observed, “[n]o doubt the guillotine is an effective instrument – quick, certain and fool proof. But we are sure that the mutilation it produces would be shocking to public opinion in [England].”¹¹⁵ Also, the firing squad was dismissed as being replete with uncertainty in “causing immediate death.”¹¹⁶ Hanging, electrocution, lethal gas, and the possibility of lethal injection were all considered, but on the predominance of “humanity” the Royal Commission relied on the evidence of the Prison Medical Officers who claimed, “[w]e cannot conceive any other method which would be more humane, efficient or expeditious than judicial hanging.”¹¹⁷ The Prison Chaplains maintained that hanging was “simple, humane and expeditious,”¹¹⁸ and the British Medical Association stated that, “hanging is probably as speedy and certain as any other method and could be adopted.”¹¹⁹

¹¹³ *ibid.*

¹¹⁴ The application of the death penalty in Spain and Portugal were not considered by the Royal Commission on Capital Punishment.

¹¹⁵ RCCP, above, fn. 8, p. 249.

¹¹⁶ *ibid.*

¹¹⁷ All quotes from *ibid.*, p. 247.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

As such, the Royal Commission was of the opinion that “a method of execution whose special merit was formerly thought to be that it was peculiarly degrading is now defended on the ground that it is uniquely humane.”¹²⁰ However, this was perhaps the most ill-founded statement of the Royal Commission. On January 10th 1925, a confidential Home Office instruction to the Prison Governors stated:

[a]ny reference to the manner in which an execution has been carried out should be confined to as few words as possible, e.g., “it was carried out *expeditiously and without a hitch*.” No record should be taken as to the number of seconds and, if pressed for details of this kind, the Governor should say he cannot give them, and he did not time the proceedings, but “a very short interval elapsed,” or some general expression of opinion to the same effect.¹²¹ (emphasis added)

The Royal Commission relied on evidence which appeared to adhere to such an instruction, which fundamentally focused upon making sure that the method was perceived as being *effective*. However, some condemned inmates did indeed struggle before the gallows and some were dragged to the noose, and some did not die “expeditiously,” but suffocated to death, and some inmate’s bowels opened. The execution of Edith Thompson, was discussed in the House of Commons and

¹²⁰ *ibid*, p. 247

¹²¹ This Home Office instruction was included in the trial of Major Blake, the former Governor of Pentonville, for official secrets in December 1926. The trial was covered in *The Times*, November 19th, December 8th and December 16th 1926, cited in Koestler, above, fn. 30, p. 140.

Beverly Baxter M.P., stated that two of the warders had told him that “Edith Thompson had disintegrated as a human creature on her way to the gallows,”¹²² and Major Blake recorded in his memoirs:

[t]hey hanged Mrs. Thompson. Her end was terrible. She had been moaning for days...In the last few days of her life, her hair was going grey, and her sufferings had been so great, that she had had a complete collapse. They carried her to the scaffold, and had to hold her while they fixed the cap around her head; she was moaning all the time. They hanged a practically unconscious woman.¹²³

Following Edith Thompson’s execution, the executioner attempted suicide. Also the Governor of Holloway Prison, Dr. Morton, was met a few days after the execution by Margery Fry, and she stated, “I have never seen a person look so changed in appearance by mental suffering as the Governor appeared to me to be.”¹²⁴ Furthermore, the evidence by the last British executioner, Alfred Pierrepont, to the Royal Commission, at first appeared to confirm the Home Office instruction, when he stated that there had “never” been any problems with executions. Then the Commissioners pressed Pierrepont and he replied that there was one moment “with a foreign spy who had to be carried to the gallows strapped to a chair.” When questioned further, he stated that “probably three more” cases were not expedient,

¹²² *Parliamentary Debates*, above, fn. 76, 14 April, 1948, vol. 449, col. 1098.

¹²³ The memoir of Major Blake, Ex-Governor of Pentonville was given to Violet Van der Elst by his son, and she reproduced the extract in *On the Gallows*, above, fn. 108, p. 150.

¹²⁴ *Miss. Margery Fry’s Statement on Mrs. Thompson’s Execution*, included as Appendix VIII, in Templewood, above, fn. 25, p. 155.

as he stated that what occurred was “like a faint at the last minute or something like that, but it has not been anything to speak about.”¹²⁵ His gradual revealing of details of the circumstances in which some condemned inmates approached the scaffold clearly does not demonstrate that hanging was without its unacceptable vicissitudes.¹²⁶

Forensic pathologists at Sheffield University, Deryk James and Rachel Nasmyth-Jones, recently examined the skeletons of thirty-four persons executed by hanging between 1882 and 1945 and found that only six skeletons had a cervical dislocation – the so-called “hangman’s fracture.”¹²⁷ Hence, it appears that in twenty-eight cases death did not occur instantly, or within a few seconds, and thus this evidence is incompatible with the Royal Commission’s statement that hanging produces an “expèdient” death. Furthermore, Harold Hillman, Director of the Applied Neurobiology Program at the University of Surrey noted that, respiration and heartbeat does not stop instantaneously but they “both start to slow immediately, but whereas breathing stops in seconds, the heart may beat for up to twenty minutes

¹²⁵ RCCP, above, fn. 8, Minutes of Evidence, para, 8402-10.

¹²⁶ George Orwell wrote about the inherent wrongness of hanging in his essay, *A Hanging*, and he stated, “It is curious, but till that moment I had never realised what it means to destroy a healthy, conscious man. When I saw the prisoner step aside to avoid the puddle, I saw the mystery, the unspeakable wrongness, of cutting a life short when it is full stride,” p. 16, in George Orwell, *Essays*, (ed. Bernard Crick) (London: Penguin, 1984).

¹²⁷ Deryk James and Rachel Nasmyth-Jones, *The Occurrence of Cervical Fractures in Victims of Judicial Hanging*, *Forensic Science International*, 54, (1992) pp. 81-91, cited in Timothy V. Kaufman-Osborn, *From Noose to Needle: Capital Punishment and the Late Liberal State*, (Ann Arbor: The University of Michigan Press, 2002).

after the drop.”¹²⁸ The official protection of the execution process by the Home Office and the Royal Commission provided a façade which can be neatly confirmed through Timothy Kaufman-Osborn’s description that the execution process is observed as a “body that suffers no pain, and a hangman who can never err.”¹²⁹

The French government had the same challenge to protect the guillotine as a legitimate method of execution. Dr. Joseph Ignace Guillotin and the idea of his “simple machine” in 1789, attempted to eradicate the barbaric mutilations in the punishment in France and substitute it with a method which would swiftly behead condemned prisoners.¹³⁰ However, at the first use of the guillotine, a journalist known as Duplan reported the inaugural execution in the *Journal de la France*, in April 27th, 1792 as:

[y]esterday there was a trial of little Louison and a head was cut off: the culprit Lepelletier...underwent this sombre experience. I have never in my life been able to go near a hanged man; but I admit that I still feel more repugnance for this type of execution; the preparations make one shiver and aggravate the mental torture.¹³¹

¹²⁸ Geoffrey Abbott, *The Book of Execution: An Encyclopedia of Methods of Judicial Execution*, (London: Headline Book Publishing, 1995), p. 263.

¹²⁹ Kaufman-Osborn, above fn. 127, p. 92.

¹³⁰ James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, (New York: Oxford University Press, 2003) p. 110-113.

¹³¹ Cited in Andre Soubiran, *The Good Doctor Guillotine and his Strange Device*, (trans: Malcolm MacCraw) (London: Souvenir Press, 1964), p. 142.

It appears that the repugnant feeling towards the guillotine lasted within many until its abrogation in 1981. The incidence of the final public execution in 1939 demonstrated an important challenge to the guillotine as a legitimate method of execution in France. Dr. Guillotin's sentiments that he wanted to create a humane way to execute criminals had failed. From the French Academy of Medicine, Doctors Piedelièvre and Fournier examined the bodies of guillotined criminals in 1956 and diagnosed:

such sights are frightfully painful. The blood flows from the blood vessels at the speed of the severed carotids, then it coagulates. The muscles contract and their fibrillation is stupefying; the intestines ripple and the heart moves irregularly, incompletely, fascinatingly. The mouth puckers at certain moments in a terrible pout. It is true that in that severed head the eyes are motionless with dilated pupils; fortunately they look at nothing and, if they are devoid of the cloudiness and opalescence of the corpse, they have no motion; their transparence belongs to life, but their fixity belongs to death. All this can last minutes, even hours, in sound specimens: death is not immediate...Thus, every vital element survives decapitation. The doctor is left with this impression of a horrible experience, of a murderous vivisection, followed by a premature burial.¹³²

Confirming the doctor's observation that death was not instantaneous, Camus cites examples from witnesses who saw the head die instantly, but momentarily the body continued to live, and *visa versa*. A French executioner's assistant stated, "[t]he

¹³² *Justice sans bourreau*, No. 2 (June 1956), cited in Camus, above, fn. 29, p. 183.

head dies at once. But the body literally jumps about in the basket, straining on the cords.”¹³³ The chaplain of Santé prison, Father Devoyod, stated that after the beheading he could, “see the condemned man’s eyes fixed on me with a look of supplication...then the lids blinked, the expression of the eyes softened, and finally the look, that had remained full of expression, became vague.”¹³⁴ As with hanging, even the guillotine did not appear to render a “humane” execution.

3.9 The Application of the *Convention* within this Historical Period

In order to understand whether the *Convention* can be seen to specifically contribute to the removal of the death penalty within Western Europe we need to reassess the genealogy of abolition to determine which countries the *Convention* could apply to and which it could not. The countries which had removed the death penalty for ordinary crimes before the *Convention* came into force were the Netherlands in 1870, and Norway (1905), Sweden (1921), Iceland (1928), Denmark (1933), Switzerland (1942), West Germany (1949), Italy (1947), Finland (1949), and Austria (1950).

Then in both Belgium and Luxembourg, although they had ratified the *Convention* in 1955 and 1953, they were not applying the death penalty for ordinary crimes.¹³⁵

¹³³ Published by Roger Grenier in *Les Monstres*, (Gallimard), *ibid*, p. 184.

¹³⁴ *ibid*, p. 185.

¹³⁵ For all *Convention* signatures and ratifications see, *Convention for the Protection of Human Rights and Fundamental Freedoms*, CETS No. 005, signatures and ratifications.

<http://conventions.coe.int/Treaty>.

At this time, there would not have been thought any scope for the *Convention* to apply.¹³⁶ Furthermore, any challenges to Portugal's penal code under the *Convention*, could only be applied after its ratification in 1978. But as it removed the punishment from its statutes following the 1978 Constitution, there could be no legal effect given to any human rights challenges and these would appear to be non-applicable since Portugal had not imposed any executions since 1867. In Spain, the death penalty was removed in 1976, and it then signed the *Convention* in 1977 and it was ratified in 1979. As such, Spain is to be viewed in the same way as Portugal in that the *Convention* did not apply to the executions it had previously administered. This leaves the United Kingdom and France.

The United Kingdom had ratified the *Convention* in 1953, and its last execution was in 1964. However, it had not accepted the right of individual petition and the jurisdiction of the European Commission on Human Rights and the European Court of Human Rights until 1966,¹³⁷ and so the *Convention* could not have been specifically used against the post-war executions. A similar legal restriction of the *Convention* was applied by France. It had removed the punishment from its statutes for ordinary crimes in 1981, and its last execution was in 1977. Although it had signed the *Convention* in 1950, it had not posted its ratification until 1974 and the right of individual petition was refused until 1981.

¹³⁶ The perception will change after 1983 with the formulation of the Council's specific human rights discourse against the punishment, and this is discussed in the next chapter.

¹³⁷ For a detailed discussion of the British political manoeuvrings which led up to the accepted this legal mechanism, see A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford: Oxford University Press, 2004), pp. 1053-1101.

By 1960, the European Commission had received 715 applications in total, with only two by states, both by Greece. Of the 713 individual applications only two were declared admissible. The mass refusal was predominately because the individuals had failed to exhaust domestic remedies as specified by *Convention* Article 26. Also, although the United Kingdom use of the death penalty in colonial territories could potentially be reviewed by the Commission,¹³⁸ the French use of the punishment in Algeria could not be reviewed as at this time France had not acceded to the jurisdiction of the Commission.¹³⁹

What this reveals is that through a technical legal interpretation, the *Convention* could not have had any direct impact on the removal of the death penalty from Western Europe before 1981. The specific provisions of the right to life under Article 2(1) and the prohibition of inhuman punishment under Article 3 were not referred to and enforced. However, as detailed above, the humanism interwoven within two Articles, as evidenced in Chapter Two, was certainly present in the

¹³⁸ In 1956, the signatory and ratification states which implemented the jurisdiction of the European Commission were Belgium, Denmark, the German Federal Republic, Iceland, Ireland and Sweden. Under *Convention* Article 25(1) they allowed individual petitions, and at this time, it is significant to note that neither the United Kingdom nor France allowed individual petitions. See, Mauro Cappelletti, 'Fundamental Guarantees of the Parties in Civil Litigation: Comparative Constitutional, International, and Social Trends,' 25 *Stan. L. Rev.* 651 (1973), pp. 665-668; Gehard Behr, 'Review: European Yearbook, Vol I,' *Yale L. J.* 437 (1956), p. 438.

¹³⁹ Gordon Weil argues that this was predominantly because of the French government in Algeria, see, 'Decisions on Inadmissibility Applications by the European Commission of Human Rights,' 54 *A.J.I.L.* 874, 4, (1960), p. 876, fn. 8.

municipal arguments that the punishment may be imposed on innocent people and that the methods of executions are inhuman. Where the interweaving of the discourses appeared to have had a more limited impact would have been in the arguments disproving the special deterrent quality, that retribution in the punishment was delegitimized, and that the punishment brutalizes society.

3.10 Conclusion

The *Convention* was not specifically referred to in the arguments for the renunciation of the death penalty in Western Europe by 1981. But it can be seen that the humanistic sentiments within the *Convention* right to life and the prohibition against inhuman punishment were significant for abolitionist arguments. However, it must be remembered that since the Enlightenment, for some of the arguments, since Ancient Greece,¹⁴⁰ the humanistic sentiments were evolving and utilised, but it was at least 200 years before they became hegemonic across Western Europe. This displays that the sovereign states were resistant to the cries of humanism which sought to protect individuals against the state. Following the war the most cogent argument for governments was that it was not an effective penal policy. This is not an argument based upon humanitarian notions, but in effect, presents the value European politics places on the utilitarian actuarial calculation. It was only after the devastation of war that the collective governments became sympathetic to these

¹⁴⁰ For example, see Thucydides, *History of the Peloponnesian War*, (trans: Rex Warner) (London: Penguin, 1972), pp. 212-222.

arguments. Then the humanistic notions were the *icing-on-the-cake* for the downfall of the ineffective penal policy.

As such the reason(s) for the removal of the death penalty within Western Europe should be viewed as predominantly a consequence of policy considerations, in that the death penalty was demonstrated not to provide a special deterrent value. But this prominence is importantly based upon the contingency of peace and security in Europe. If peace goes it was thought at this time that the punishment could return. This is seen as the majority of European countries reserved the punishment in times of war. The significance of this will be returned to later in Chapters Five and Six. However, if peace endures, the governments are more likely to accept the humanitarian arguments, and it will be charted in the next chapter that the humanism present within the Convention actually did significantly contribute to the affirmation and further demise of the punishment.

Only after France had abolished the death penalty in 1981, and the Western European governments joined and accepted this change did human rights have a role in questioning the legitimacy of the death penalty. The next chapter charts the evolution of the anti-death penalty discourse in the European human rights system.

Chapter Four:
The Attempt to Create the Death Penalty as a Question of
Human Rights

4. The Attempt to Create the Death Penalty as a Question of Human Rights

4.1 Introduction

The previous chapter argued that the Western European governments had, by 1981, independently chosen not to apply the death penalty in peacetime for ordinary crimes. This choice to renounce the punishment was made without any centralised Council position against the punishment. This chapter charts a similar historical period beginning from the post-1953 adoption of the *Convention* through to 1983 (the previous chapter ended in 1981). However the analysis within this chapter is not from the perspective of individual states and municipal law, but of the Council's supra-national consideration of the punishment, and its development as a question of human rights.

Three historical periods are considered. Firstly, between 1953 and 1972, as this period includes the first Council Convention, the first European Commission on Human rights decision, and the first specific Council report, to consider specifically the issue of the death penalty. It is investigated whether the Council, through the initial considerations of the punishment within these three circumstances, was able to formulate solutions to the problematical question of how to develop human rights standards within the political and legal evolution that was taking place. As such it is analysed whether in this period the Council had demonstrated the death penalty was considered to be a specific human rights issue at all. Secondly, the period between

1973 and 1982 is considered and the different discussions and enactments within the Parliamentary Assembly and the Committee of Ministers. The attempts of the Assembly to elevate human rights above the political decisions to choose to implement the death penalty is analysed. It will be investigated whether there was a coherent policy proposed by the Assembly or whether there were elements of uncertainty and ambivalence within the developing and evolving discourse.

Finally, this chapter deconstructs the formulation of *Protocol No. 6* in 1983 which calls for the abolition of the death penalty in peacetime.¹ It was the first legal instrument in international law to restrict the punishment to wartime offences. The fundamental issue which this section addresses is what effect the legislation had on this period of the history of the Council? It will be asked whether this period can be shown to identify that the formulation of a protocol had the function of either directly or indirectly furthering the human rights discourse or whether the protocol merely affirms the sovereign Member State's right to choose whether or not to apply the death penalty in certain circumstances. Intrinsic to the analysis will be the relationship and dialogue between the Parliamentary Assembly and the Committee of Ministers.

4.2 Tentative Beginnings and Uncertainties: 1953 to 1972

¹ *Protocol No. 6 to the Convention for the protection of human rights and fundamental freedoms concerning the abolition of the death penalty*, CETS No. 114, Strasbourg, 28th April 1983.

The Council's approach to the question of the death penalty should first be seen in the context of analysis concerning the organisation's success between 1953 and 1972. The then Secretariat-General of the Council of Europe, A.H. Robertson, reviewed the history of the organisation from 1950 to 1961 and stated in general terms, "the Council of Europe had not achieved great success with its long-term political objectives."² In his reports on the "juristic activity" of the Council, Frank Dowrick noted that during this period the Council still appeared to be a "weak confederation of states."³ However, Robertson also observed that the Council had "established a technique of convention making which constituted one of its real achievements."⁴ Although the Council was not seen to have a significant impact on state actions, the conventions adopted at least placed its objectives on the Member State agendas. This included the initial steps dealing with the possibility that the death penalty could become a human rights question.

Following the adoption of the *Convention*, the first Article to specifically engage with the death penalty appeared in the 1957 *European Convention on Extradition*⁵ (hereinafter, "Extradition Convention"). It attempted to regulate transfer proceedings on a multilateral basis, and enhance the regional mechanisms alongside

² A.H. Robertson, 'The Legal Work of the Council of Europe,' 1, *I.C.L.Q.* 10, 143 (1961), p. 165.

³ Frank Dowrick, 'Council of Europe: Juristic Activity 1974-86, Part I,' 36 *I.C.L.Q.* 3, 633 (1987), p. 634. See also, *ibid*, 'Council of Europe: Juristic Activity 1974-86, Part II,' 36 *I.C.L.Q.* 4, 878 (1987). This two part report updated the report in F.E. Dowrick, 'Juristic Activity in the Council of Europe: 25th Year,' 23 *I.C.L.Q.* 3, 610 (1974)

⁴ Robertson, above, fn. 2, p. 165.

⁵ *European Convention on Extradition*, CETS No. 024 (1957), entered into force on 18th April 1960, with the ratifications of six states: Denmark, Greece, Italy, Norway, Sweden and Turkey.

the individual state bilateral treaties.⁶ It represented the first regional attempt to regulate state cooperation in apprehending criminal suspects, and also provided for punishments which were acceptable to the Council Member States following extradition proceedings. The Consultative Assembly had proposed in 1951 that the *Extradition Convention* should be adopted with “a view to the punishment of those committing crimes on the territory on one of the Members of the Council of Europe, and taking refuge on the territory of another Member.”⁷ The *Preamble* considered the “aim of the Council of Europe is to achieve a greater unity between its members,” and that “the acceptance of uniform rules with regard to extradition is likely to assist this work of unification.” Hence, the inherent motivation of the *Extradition Convention* was to facilitate these aims of the Council. It sought to achieve this through establishing *inter alia* a multilateral obligation to extradite,⁸ a prohibition on extradition for political offences,⁹ and a right to refuse the requesting

⁶ See, A.H. Robertson, ‘The Contribution of the Council of Europe to the Development of International Law,’ 59 *Am. Soc’y Int’l L. Proc.* 201 (1965), p. 205.

⁷ Recommendation 16, *on the preparatory measures to be taken to achieve the conclusion of a European Convention on Extradition*, adopted, 8th December 1951, (35th sitting). Also, to facilitate greater cooperation within criminal law issues the *European Convention on Mutual Assistance in Criminal Matters*, CETS No. 030, 20 April 1959, entered into force in 1962. It did not consider the issue of the death penalty, but related generally to state cooperation in communication of criminal records and judicial verdicts in criminal cases.

⁸ *Convention on Extradition*, above, fn. 5, Article 1. Robertson has stated that this Convention, “showed the desirability of establishing...methods of co-operation between the European States in the administration of justice,” above, fn. 6, p. 206.

⁹ *ibid*, Article 3.

state's extradition application.¹⁰ Article 11 specifically concerns the death penalty. It states:

[i]f the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurances as the requested Party considers sufficient that the death-penalty will not be carried out.

In the Explanatory Report to the European Convention on Extradition, concerning Article 11, it indicated that the criteria for determining whether requesting states' assurances are "sufficient" may vary according to different country's standards, and that it may constitute either; (a) a formal undertaking not to carry out the death penalty, (b) an undertaking to recommend to the Head of State that the death penalty be commuted, (c) a simple statement that it is intended to make such a recommendation, or, (d) an undertaking to return the person extradited if he is condemned to death. The Explanatory Report affirmed that it "is in any case for the requested Party to decide whether the assurances given are satisfactory."¹¹

This reveals that the question was fundamentally a state choice issue, and it was not for the Council, but the Member States to initiate restrictive proceedings on the

¹⁰ *ibid*, Article 6.

¹¹ *Explanatory Report: European Convention on Extradition*, ETS No. 024, Paris, 13 December 1957, 'Commentaries on the Articles of the Multilateral Convention on Extradition,' Article 11.

death penalty. It should be noted that Article 11 does not prohibit states which had removed the death penalty from their domestic statutes from extraditing a suspect to face a capital trial, only that the Article “may” provide the option of non-extradition. Furthermore, the requirement for assurances was not as watertight as it may appear on a first reading. Points (b) and (c) above appear to only be initiated once a capital trial had been concluded and when the execution date approached. In addition, (d) inherently accepts that the suspect would have gone through a capital trial, was on death row and awaited execution. Point (a) appears to be the only provision to provide for an adequate assurance which would have prevented not only an execution but also that no capital charges would be allowed.¹² Furthermore, it could have been argued that the explanations provided under points (b) and (c) would not be strong enough to prevent an execution following a capital trial as only a “recommendation” or “simple statement” is required.

Article 11 does provide a mechanism for international relations to determine the question. It is a specific mechanism which did not directly allow for human rights considerations to determine the extradition circumstances. This is further supported by the fact that Article 11 does not explicitly give any reasons why the death penalty is not considered acceptable, and furthermore, makes no attempt to engage the punishment under *Convention* Articles 2(1) and 3 within the text or the Explanatory Report.

¹² I have discussed the issue of extradition circumstances and “adequate assurances” elsewhere, see Jon Yorke, ‘Europe’s Judicial Inquiry in Extradition Cases: Closing the Door on the Death Penalty,’ *E.L. Rev.* 2004, 29 (4), 546.

A.H. Robertson did not appear to consider these issues when he stated that Article 11 “continues with a number of detailed provisions about the procedure to be followed in making, considering and complying with requests for extradition.”¹³ He made these statements when the Council human rights thresholds on extradition and the death penalty were just beginning to evolve. The reservations and declarations on Article 11 displayed that in some cases a capital trial can ensue,¹⁴ and furthermore, it is a policy question to be determined by the states and not the Council.¹⁵

Italy had provided a declaration in 1957 that “it will not, under any circumstances, grant extradition in respect of offences punishable by death under the law of the requesting Party.”¹⁶ However, in a 1977 decision by the Italian *Corte di Cassazione*, an extradition request of a suspect charged with a capital offence by France, who was not a party to the *Extradition Convention*, was granted under the 1870

¹³ Robertson, above, fn. 2, pp. 151-2.

¹⁴ For a detailed account of reservations in Council Conventions, see, Sia Spiliopoulou Åkermark, ‘Reservation Clauses in Treaties Concluded within the Council of Europe,’ 48 *I.C.L.Q.* 3, 479 (1999).

¹⁵ See *Explanatory Report*, above, fn. 11, Austria made a reservation confirming that it would not extradite an individual to face the death penalty; also, Italy, Liechtenstein, Spain’s declaration on Article 11 allowed for a capital trial, but that the execution could not be carried out...but Greece inserted a reservation that it would extradite an individual to face a capital trial as long as the charge was in conformity with Article 437 (1) of the Greek Code of Criminal Procedure. As this article would “continue to be applied in place of Article 11 of the Convention.” Switzerland also made a similar reservation to that of Greece.

¹⁶ *ibid*, Italy: Declaration made at the time of signature, on 13 December 1957, and confirmed at the time of deposit of the instrument of ratification, on 6 August 1963.

Extradition Treaty between Italy and France.¹⁷ The reason provided by the court was that Article 11 only applied to parties to the *Convention*. However, in 1979, the Italian Constitutional Court in *Re Cuiller, Ciamborrani and Vallon* held that the rule in the Italian-French bilateral treaty was void, insofar as it permitted the extradition of a suspect to face a capital trial, and it held that such transfer proceedings violated the Italian Constitution.¹⁸ Turkey's reservation reveals another example of the state reserving to itself the right to choose the death penalty in certain circumstances when it stated:

The assurance mentioned in Article 11 will be limited to the following procedure:

In the event of extradition to Turkey of an individual under sentence of death or accused of an offence punishable by death, any requested Party whose law does not provide for capital punishment shall be authorised to transmit a request for commutation of death sentence to life imprisonment. Such request shall be transmitted by the Turkish Government to the Grand National Assembly, which is the final instance for confirming a death sentence, insofar as the Assembly has not already pronounced on the matter.¹⁹

¹⁷ See, Cassazione penale, sez. I 9 maggio 1977, 21 *Rivista Italiana di Diritto e Procedura Penale* (1978), cited in Stefano Manacorda, 'Restraints on death penalty in Europe: a circular process,' 1 *J.I.C.J.* 262, (2003), p. 277.

¹⁸ *Re Cullier, Ciamborrani and Vallon*, 78 ILR 93, 99 (Corte cost. 1979), cited in, Andrea Bianchi, 'Venezia v. Ministero di Grazia E Giustizia, Judgment No. 223.79 *Rivista di Diritto Internazionale* 815 (1996),' 91 *A.J.I.L.* 4, (1997), 727, p. 728.

¹⁹ *Explanatory Report*, above, fn. 11.

Like the United Kingdom and France, Turkey still imposed executions, and this reservation clearly attempts to keep open the possibility of the punishment.²⁰ Turkey would only “transmit a request” but the request did not prevent the death penalty from being imposed. By 1974 the United Kingdom, France and Germany had not ratified the *Extradition Convention*, and this demonstrated their intentions to deal with extradition through municipally controlled mechanisms within bilateral treaties.

The *Extradition Convention* had not directly contributed to the human rights discourse, but facilitated the already existent observation that the death penalty was a domestic issue. It should be understood within this historical context as providing the Western European governments with the option to promote their abolition of the punishment in peacetime.

4.2.1 The Cyprus Revolt

The first case which the European Commission of Human Rights considered that included capital laws and executions,²¹ was the 1957 case of *Greece v. United Kingdom*.²² A special Sub-Committee of the European Commission of Human

²⁰ Turkey’s last execution was in 1984, see Chapter Six below.

²¹ The European Commission of Human Rights and the extent of its jurisdiction was mandated within the original *Convention*, Articles 20-37.

²² Council of Europe, *Application by the Government of the Kingdom of Greece, lodged against the Government of the United Kingdom of Great Britain and Northern Ireland*, Application No. 176/56,

Rights (hereinafter, “Sub-Committee”) was established with an investigatory mandate restricted to scrutinising the emergency situation in Cyprus.²³ From 1954 the United Kingdom colonial government adopted emergency legislation in various forms to suppress the terrorist activities of the EOKA (National Organisation of Cypriot Fighters).²⁴ To counter the uprising, emergency measures were adopted which included the imposition of the death penalty for the newly classified crimes. Before the emergency the death penalty was reserved for treason and murder but, Regulations 52, 53, 53A and 53B considerably extended its scope and introduced the mandatory application of the punishment in terrorist cases.²⁵ Regulation 52 provided the death penalty or life imprisonment for discharging a firearm at a person, throwing or exploding bombs with intent to cause homicide, bodily injury,

Application of the European Convention of Human Rights and Fundamental Freedoms to the Island of Cyprus, Report of the European Commission of Human Rights, Doc. No. A 42.048, (Article 31 of the Convention) (Strasbourg, 26 September, 1958), in A.H. Robertson et al (ed) European Commission on Human Rights: Documents and Decisions 1955-1956-1957, (The Hague: Martinus Nijhoff, 1959), pp. 48-9.

²³ Robert Holland, *Britain and the Revolt in Cyprus, 1954-1959*, (Oxford: Clarendon Press, 1998), p. 133. For a detailed analysis of the two cases brought by Greece against the United Kingdom. see A.W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention*, (Oxford: Oxford University Press, 2004), pp. 924-1052.

²⁴ The Greek translation being, *Ethniki Organosis Kyprison Agoniston*.

²⁵ Supplement to Cyprus Gazette, No. 4001 (Nov. 22, 1956), cited in A.W. Brian Simpson, ‘Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights,’ 41 *Loy. L. Rev.* 629 (1996), p. 658, fn. 264. As outlined in Chapter Two above, the drafters of the *Convention* did not debate the mandatory death penalty and the final *Convention* text is silent on the issue. For arguments against the mandatory death penalty, see, David Pannick, who stated, it is “neither fair nor reasonable, and lacks the procedural safeguards demanded by the rule of law,” in *Judicial Review of the Death Penalty*, (London: Duckworth, 1983), p. 114.

or damage to property. Furthermore, the mandatory death penalty for discharging weapons, throwing or detonating bombs, being in possession of bombs or weapons, and for consorting with insurgents were also extended. In addition, Regulation 53A provided a general offence of:

consorting or being in the company of [anyone] carrying or has in his possession or under his control [a firearm or explosive] in circumstances which arise a reasonable presumption that he intends, or is about to act, or has recently acted, with such other person in a manner prejudicial to public safety or the maintenance of public order.²⁶

The punishment for this loosely defined Regulation was the mandatory death penalty. These draconian laws were applied to administer the executions of two Cypriots, Andreas Demetriou on 10th May 1956 and Evagoras Pallikarides on 14th March 1957. Demetriou was found guilty of wounding, and Pallikarides, who was only 18 years old, was arrested in December 1955 when an army patrol came across an armed EOKA group making its way to their winter hide-out. Pallikarides's companions escaped but he surrendered without resistance and following a trial was executed.²⁷ Nancy Crawshaw observed concerning the two executions of Demetriou and Pallikarides, that in the former case under normal criminal law he would have

²⁶ Simpson, above, fn. 23, p. 975.

²⁷ *Times of Cyprus*, 14th March 1957, cited in Robert Holland, *Britain and the Revolt in Cyprus: 1954-1959*, (Oxford: Clarendon Press, 1998), p. 173.

been liable for only a maximum sentence of life imprisonment, and in the later case, no severe charges would have been possible.²⁸

The adoption of the Regulations brought international pressure upon the British government, and ultimately Greece's application to the European Commission of Human Rights claiming that the British government, in its occupation of Cyprus, had violated virtually all of the substantive Articles of the *Convention*.²⁹ Brian Simpson records in detail the political manoeuvrings and legal submissions for the *First Cyprus Case*, which predominantly concerned *Convention* Article 15 and the application of governmental emergency powers in derogation.

The *Second Cyprus Case* was then to consider Articles 2 to 11, but after many legal petitions by the British government, it was never heard.³⁰ On 7th May 1956, Greece submitted an application outlining a general argument against the British use of emergency laws and stated, "[t]he exceptional measures adopted by the British administration authorities in Cyprus have meant the denial of nearly all human rights and fundamental freedoms in the island."³¹ In reply the British government accused the Greek government of supporting terrorism, and referred to the United

²⁸ Nancy Crawshaw, *The Cyprus Revolt: An Account of the Struggle for Union with Greece*, (London: George Allen & Unwin, 1978), pp. 232-3.

²⁹ It was initially claimed by the Greek government that Articles 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 15, had been violated, see *Application No. 176/1956*.

³⁰ See, Simpson, above, fn. 24, p. 924-1052; A.H. Robertson (ed) *European Commission on Human Rights: Documents and Decisions 1955-1956-1957*, (The Hague: Martinus Nijhoff, 1959), pp. 48-9.

³¹ *ibid*, Simpson, p. 930.

Nations Charter and the sovereignty of individual states and non-interference of internal affairs.³²

On 4th April 1956, before the Greek application, the British government had begun to amend Regulations 52, 52A, 53, 53A and 53B. The mandatory death penalty was replaced and a discretionary punishment reintroduced. The scope of the punishment was then refined to the discharging or carrying firearms and using explosives to endanger life or cause bodily harm.³³ Furthermore, nine executions had taken place under the emergency legislation,³⁴ and only the executions of Demetriou and Pallikarides, did not involve a homicide. However, the British government stated to the Sub-Committee in the oral hearings of the 2nd to 3rd July, that the state of emergency would have to continue, “until the remaining terrorists are killed, captured or leave Cyprus, and until it becomes certain that there exists no further danger of a renewal of terrorism.”³⁵

The identified emergency situation penetrates the dividing line between the “reason of state” and “self-defence” as recognised by the drafters of the *Convention*, but there is one important difference, that such measures were not being claimed to apply to domestic sovereignty over territory, but sovereignty over colonial territory. This was a situation not envisioned by the drafters, and as the second case was abandoned, the Sub-Committee did not specifically engage with *Convention*

³² *ibid*, p. 935.

³³ *ibid*, p. 971.

³⁴ *ibid*, p. 920.

³⁵ *ibid*, p. 974.

Articles 2(1) or 3. On the general issue of the emergency laws as a function to protect the life of the nation, the Sub-Committee held:

[o]ne must however consider that these incidents emanated from a fast growing and militant organisation which, according to its own statements, aimed at obtaining self-determination for Cyprus by all possible means, including force and violence. These two factors together make it at least plausible to assume that there already existed, *before the proclamation of the state of emergency, a public danger threatening the life of the nation. The assessment of whether or not a public danger existed is a question of appreciation.* The United Kingdom government made such an assessment of the situation prevailing at the time and concluded that there existed a *public danger threatening the life of the nation.* That this appreciation by the British government was correct was subsequently proved by the great increase in violence which occurred between November 1955 and March 1957 (emphasis added).³⁶

The Sub-Committee's focus on the violence which threatened the "life of the nation" is fundamentally important. It was considered legitimate that the death penalty could be imposed as part of emergency (re)action. In the drafting dialogues, as outlined in Chapter Two, Maccas argued that the state must be able to defend itself or perish in suicide.³⁷ The Sub-Committee identified that the "United Kingdom government made such an assessment" of actions perceived for legitimate

³⁶ Report, para 132.1, p. 140, cited in *ibid*, p. 975.

³⁷ *TP*, 1, p. 108.

defence. In observing the role of the state in determining the extent of *Convention* rights, it applied what has become known as the doctrine of “margin of appreciation” for the Council Member States.³⁸ It adopted the language appropriate for a legitimate Article 15 derogation because the “life of the state” was perceived to be threatened.³⁹

The Sub-Committee’s decision can be seen as manifesting the political sentiments of the drafters of both the *Statute* and *Convention*. Such reasoning must first be viewed in its historical setting, representing an initial refusal of the European Commission of Human Rights to place human rights on *par* with sovereign rights but also as a manifestation of the sovereign right to protect itself if it can prove that its very existence is being threatened. Of course, each claim of threat must turn on the individual facts. A further point to note, as the previous chapter explained, is that between 1955 and 1981, none of the executions which occurred in the Member States were challenged within the Commission or the Court. The case discussed above was not brought by any individuals, but by a state (Greece) against another state (United Kingdom). The European Commission of Human Rights did not hand down a specific judgment on whether the death penalty was a human rights question

³⁸ Colin Warbrick states that the “margin of appreciation is the discretion left to a State by the Convention in determining the necessity of measures of derogation from protected rights in the circumstances prevailing within its jurisdiction,” ‘The European Convention on Human Rights and the Prevention of Terrorism,’ 32 *I.C.L.Q.* 1, 82, (1983), p. 99.

³⁹ Marie-Benedict Dembour, argued that the Sub-Committee’s reasoning provided the foundation for the future development of the jurisprudence on derogation under Article 15, see, *Who Believes in Human Rights? Reflections on the European Convention*, (Cambridge: Cambridge University Press, 2006) pp. 44-47.

and whether the punishment violated the *Convention*. It had accepted that, ultimately, the issue of the death penalty was a Member State issue, and not yet one of human rights.

So far this chapter has observed that the Council, through the *Extradition Convention*, and the first European Commission of Human Rights decision, accepted the death penalty as a domestic issue. Below we now investigate the research and publication of the first specific report on the death penalty by the European Committee on Crime Problems, and consider whether this publication was the first real attempt to bring the punishment within a human rights discourse.

4.2.2 The Creation of the European Committee on Crime Problems

In reviewing the first 25 years work of the Council, Frank Dowrick stated that the various “organs of the Council of Europe are very much alive to the need to revise and extend the basic doctrine of Human Rights.”⁴⁰ To demonstrate this, the revision and extension of the Council’s human rights framework was initiated by the Parliamentary Assembly formulating subordinate bodies such as the Legal Affairs Committee and the European Committee on Crime Problems (hereinafter “ECCP”). The ECCP held its first meetings between 30th June and 3rd July 1958. It elected Sir Lionel Fox as its chairman, Marc Ancel as its vice-chairman and Paul Cornil as its *rapporteur*.⁴¹ The programme of the ECCP derived to a large extent from the

⁴⁰ Dowrick, above, fn. 3, p. 616.

⁴¹ Robertson, above, fn. 2, p. 159.

“biennial meetings of the Conference of European Ministers of Justice,”⁴² and it conducted its work through Sub-Committees. There were five initial Sub-committees,⁴³ with a specific Sub-Committee on the Death Penalty set-up to study “the death penalty and its alternative in the member countries of the Council of Europe.”⁴⁴

In 1957 the ECCP identified the death penalty as a “problem” in the first program that it drew up.⁴⁵ In 1962, Marc Ancel, as the new Chairman of the Sub-Committee, noted in the first specific Council publication on the death penalty that the punishment was “one of the first subjects” to be investigated.⁴⁶ This was primarily because the Council was unsure to what extent the application of the death penalty

⁴² Dowrick, above, fn. 3, p. 630.

⁴³ The five European Committee on Crime Problems sub-committees were 1) Sub-Committee on the Death Penalty; 2) Sub-Committee on the Civil and Political Rights of Prisoners, 3) Sub-Committee on Co-operation between European States with Regards to Traffic Offences, 4) Sub-Committee on After-Care (for post-imprisonment treatment), and 5) Sub-Committee on Juvenile Delinquency, see, Robertson, above, fn. 2, pp. 159-160.

⁴⁴ Hugh J. Klare, ‘Notes: The Work of the European Committee on Crime Problems,’ 1 *Brit. J. Criminology*, 377, (1960-1961), p. 378.

⁴⁵ Hans Christian Krüger stated, “barely four years after the entry into force of the Convention, there was a move at expert level of the Council of Europe to study the problem of capital punishment in Europe,” in *Protocol No. 6 to the European Convention on Human Rights*, in Council of Europe, *Death Penalty – Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004), p. 87, See also, Marc Ancel, ‘The Problem of the Death Penalty,’ in Thorsten Sellin, (ed) *Capital Punishment*, (New York: Harper and Row, 1967).

⁴⁶ Marc Ancel, *The Death Penalty in European Countries*, (European Committee on Crime Problems) (Strasbourg: Council of Europe, 1962), p. 3.

was compatible with the evolving human rights discourse. Ancel was confronted with this difficulty and he stated it “was understood that the question of the abolition or otherwise of the death penalty was not to be examined as such.”⁴⁷ He set out the methodological mandate for the report as being to investigate the death penalty, “principally from the angle of substantive law and current practice in Council countries.”⁴⁸

This report can be viewed as an updating and widening of the comparative material compiled by the Howard League for Penal Reform in 1928, the 1930 Select Committee on Capital Punishment and the 1953 Royal Commission on Capital Punishment. Indeed, all the countries selected for the report, except the Federal Republic of Germany, had already appeared in one or all of the previous studies.⁴⁹ In maintaining this formal positive law approach, the report outlined four themes for the collection of data on the punishment in Europe being; (a) legislation on the death penalty, (b) judicial and administrative practice, (c) sociological and criminological factors, and (d) proposed legislative reform and crime policy. These four categories were designed to reflect the state practices in 1962.

However, Ancel knew that there was much more to the death penalty than the report could reflect. He gave pointers of the problem and it is worth citing his observations at length. He stated:

⁴⁷ *ibid.*

⁴⁸ *ibid.*

⁴⁹ The countries selected by the European Committee on Crime Problems were: Austria, Belgium, Denmark, France, Greece, Italy, Luxembourg, Norway, the Netherlands, Federal Republic of Germany, United Kingdom, Sweden, Switzerland and Turkey, *ibid*, p. 4.

the subject was to be considered in relation to ordinary law crimes and criminals only, excluding political crimes, espionage, collaboration with the enemy and crimes punishable by military law. This has become a particularly thorny question in recent years when countries which were resolutely abolitionist have, temporarily at least, re-introduced capital punishment. It would be a mistake, however, to think that these countries had abandoned their abolitionist principles, even in part. Similarly, the fact that a country's military law still provides for the death penalty is not enough to classify it as a country where capital punishment still exists. As Beccaria said two centuries ago, even the most convinced abolitionists realise that there may be special circumstances, or particularly troublous times, which justify the re-introduction of the death penalty for a limited period. Such questions are outside the scope of a study of capital punishment in relation to ordinary criminal law, which is our only purpose here.⁵⁰

There is a clear absence of human rights considerations in this passage. Ancel had not provided an answer to how human rights might contribute to the "thorny question" of the exceptional circumstances in which the states may choose to impose the death penalty. It was further accepted that "the countries of Western Europe are yet divided in their attitude to capital punishment."⁵¹ As such, the report can be seen as replicating the issues which were considered in the two previous chapters. Ancel accepted the punishment was ultimately a state question and human

⁵⁰ *ibid*, p. 3.

⁵¹ *ibid*, p. 8.

rights were not investigated as a possible infringement of this political circumstance. Furthermore, in the restriction and removal of the punishment, the penological issues of deterrence and protection of society,⁵² miscarriages of justice and the execution of the innocent,⁵³ along with other sociological factors, were the predominant factors to consider.

Such an approach was consistent with not only the above mentioned European Commission of Human Rights case in *Greece v. United Kingdom*, but it also reflects the sentiments of a respected jurist of the time, Jean Graven, Judge of the Court of Appeal of Geneva, and Professor of Law at the University of Geneva. Graven published a monograph entitled, 'New Reflections on the Death Penalty' in 1961,⁵⁴ which was a response to the views expressed by Albert Camus and Arthur Koestler as outlined in the previous chapter. Graven agreed with most of the anti-death penalty arguments but he maintained that there was one basic objection to the abolitionist's case in that "the true problem is the protection of the organised, civilized community."⁵⁵ He further argued, in Westphalian rhetoric, that "[i]t is not 'war' or 'peace' which should be the decisive factor in justifying measures of social defence; the criterion should be the danger incurred and what protection is needed."⁵⁶

⁵² *ibid*, p. 42-44.

⁵³ *ibid*, p. 51.

⁵⁴ Jean Graven, *New Reflections on the Death Penalty*, (Institute of Comparative Law, University of Paris, 1961), reviewed with translations by James Avery Joyce, *The Right to Life: A Worldview of Capital Punishment*, (London: Victor Gollancz, 1962).

⁵⁵ *ibid*, p. 269.

⁵⁶ *ibid*, p. 270.

Graven's arguments could be recognised as a distinction between civil and military protection, because "capital punishment cannot be separated from that man-produced and man-continued violence which we call war."⁵⁷ While Graven agreed that the death penalty should be renounced outside war circumstances, he thought that in times when military action ensues the possibility of the death penalty emerges. Graven's opinions will become very important in the Council's policy in 1982-3, and this is considered below.

Ancel's report included many aspects which were similar to Graven's arguments. He revealed the prominence of the state choice of the death penalty at this time in European penal history because "politics have a very great influence either in favour of the legal abolition of the death penalty or in favour of its reintroduction."⁵⁸ He was aware that the death penalty may be applied in a "state of emergency,"⁵⁹ noting that in France the death penalty is applied for crimes against the "nutrition and health of the nation,"⁶⁰ and in Greece for crimes "against the integrity of national territory,"⁶¹ and that when abolition has been initiated it may "not be...lasting."⁶² He also noted that:

⁵⁷ *ibid*, p. 271.

⁵⁸ Ancel, above, fn. 46, p. 13.

⁵⁹ *ibid*.

⁶⁰ *ibid*, p. 17.

⁶¹ *ibid*, p. 18.

⁶² *ibid*, p. 48.

[p]olitical circumstances are of the utmost importance in this connection. They may precipitate the movement but they may also, like all upheavals, such as foreign or civil war, compromise the general trend. They may sometimes impose on an abolitionist country a reintroduction of capital punishment as fleeting as is its abolition in other countries... History has shown that certain striking events, namely the commission of particularly atrocious crimes repeated with alarming frequency over a short period or in the same locality may provoke a sudden reversal of opinion and even lead to the reintroduction of the death penalty.⁶³

What Ancel did not venture to explore was whether in what circumstances human rights could be compatible with state action to choose to implement the death penalty. The *Convention* text was not specifically engaged with, and no analysis of Article 2(1) or 3 was provided or whether the death penalty could be seen to violate the *Convention* in any way. However, the absence of a consideration of the *Convention*, did not prevent the report from encouraging the continued removal of the punishment in Council Member States. Ancel concluded by predicting the continued trend of state renunciation when he observed:

[m]embers of the Council of Europe abolitionist countries are well in the majority. Elsewhere, apart from the various accidents of legislation in France, capital punishment simply survives in theory and its application is declining steadily. An impartial glance at the facts clearly shows that the death penalty is

⁶³ *ibid*, pp. 49-50.

regarded in Europe as something of an anachronism, surviving precariously for the moment but perhaps doomed to disappear.⁶⁴

At this time Britain France and Spain maintained the death penalty, although it was administered infrequently. It is significant to note that the evaluation by the Sub-Committee is not to be interpreted as promoting a specific human rights agenda, but acceptance and encouragement of state renunciation. As such it is appropriate to situate this text as maintaining the political status quo.

We can place this initial work within the general criticisms by Sir Leon Radzinowicz. He was instrumental in the early work of the ECCP and he was the first Chairman of the Sub-Committee, the Criminological Scientific Council in 1963.⁶⁵ Radzinowicz presented a report which was a frank evaluation of the work of the ECCP in 1968, and he stated:

[i]nternational activities [of the ECCP] were...fraught with difficulties and disappointment: the working tempo was inevitably sluggish, considerable circumspection was necessary, only limited projects could be tackled, while

⁶⁴ *ibid*, p. 55.

⁶⁵ Inkeri Anttila, 'The Foundation of Co-operation in European Criminological Research: Sir Leon Radzinowicz and the Criminological Scientific Council at the Council of Europe,' p. 25, in Roger Hood (ed), *Crime, Criminology and Public Policy: Essays in Honour of Sir Leon Radzinowicz*, (London: Heinemann, 1974).

more important issues had to be shelved, and there was no immediate visible result.⁶⁶

Ancel's report had not produced any "immediate visible result," with regards to developing the death penalty as a human rights issue in the Council. Radzinowicz's general observations can be specifically applied to the death penalty when Hans Christian Krüger, a later *rapporteur* for the Committee of Legal Affairs, also remarked that the ECCP's work had "[f]or a long time...not yield results."⁶⁷

Following the limited provisions for restricting the punishment under the *Extradition Convention*, the inadequacy of the first European Commission of Human Rights consideration of executions in Cyprus, and the limited value of the first report on the death penalty, the Parliamentary Assembly saw that, in order to formulate a specific human rights analysis of the death penalty, the investigations into the punishment needed to become more specific and more radical. We now consider the Parliamentary Assembly's strategies for incorporating the death penalty as a question of human rights.

4.3 The Attempts to Encompass the Death Penalty into a Specific Human Rights Question: 1972-1982

⁶⁶ Leon Radzinowicz, *Fifth European Conference of Criminological Research Institutes*, (Strasbourg: Council of Europe Press, 1968), p. 16.

⁶⁷ Hans Christian Krüger, 'Protocol No. 6 to the European Convention on Human Rights,' p. 70, in Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Press, 1999).

The Parliamentary Assembly was initially tentative in its own consideration of the death penalty. There is a clear omission of the punishment in Recommendation 654 (1972) *on the role on the Council of Europe in the field of penal law*.⁶⁸ The recommendation welcomed that “substantial achievements” in the field of penal law had taken place within Member States,⁶⁹ and noted that “the Council of Europe will continue in the years to come to play a central role in European co-operation in matters of penal law.”⁷⁰ It did not comment on the rate of abolition but recommended that the Committee of Ministers invite the remaining member states to sign and ratify *inter alia* the *European Convention on Extradition*,⁷¹ and also to:

instruct the European Committee on Crime Problems to study what fields of substantive and adjective penal law the Council of Europe might usefully work on with a view to the harmonisation of penal law in Europe, such as environmental questions, the protection of the private life of the individual, the taking of hostages and kidnapping in connection with crimes against property.⁷²

One of the central issues within this recommendation was to promote harmonisation in penal law. But there was no parliamentarian yet prepared to place a specific

⁶⁸ Recommendation 654 (1972) *on the role on the Council of Europe in the field of penal law*, text adopted by the Assembly on 20 January 1972 (17th sitting).

⁶⁹ *ibid*, Point 1.

⁷⁰ *ibid*, Point 4.

⁷¹ *ibid*, Point 7(a)(i).

⁷² *ibid*, Point 7(c).

debate of the punishment on the Assembly's agenda. What is observed is that with the encouragement of the ratification of the *Extradition Convention*, the restriction of the death penalty through indirect means was a possible human rights strategy. Also, the Parliamentary Assembly's recommendations on the combat of terrorism in 1973⁷³ and 1979⁷⁴ condemned the acts of terrorism in the 1970s, and mandated the importance of punishing terrorists but both recommendations did not call for the death penalty. This can be interpreted as demonstrating that the punishment of terrorists should encompass alternative penal measures.⁷⁵ But all of these issues included within the above mentioned recommendations were peripheral to a specific adoption of the punishment within a general discourse of human rights.

The initial proposal for the death penalty to develop as a human rights question appeared in 1973. Astrid Bergegren, a Swedish parliamentarian, presented a Motion in the Parliamentary Assembly on the abolition of the death penalty.⁷⁶ This first specific motion to call for abolition began with Point 2 referring to the irrevocability of the punishment and the infallibility of the judiciary and that innocent people may

⁷³ Recommendation 703 (1973) *on international terrorism*, adopted by the Assembly on 16 May 1973 (4th sitting).

⁷⁴ Recommendation 852 (1979) *on terrorism in Europe*, adopted by the Assembly on 31 January 1979 (22nd sitting).

⁷⁵ This specific argument has been made within the modern European context at least since François Guizot in 1848 in his 'A Treatise on Death Punishments,' in, *ibid*, *General History of Civilisation in Europe: From the Fall of the Roman Empire Till the French Revolution*, (Edinburgh: William and Robert Chambers Press, 1848).

⁷⁶ *Motion for a resolution on the abolition of capital punishment* (Doc. 3297), Legal Affairs Committee, 8th Sitting 18 May 1973.

be killed.⁷⁷ Point 3 argued that “capital punishment has not been shown to have any deterrent effect,” and Points 5 and 6 noted that the executions contributes to a brutalising of society. The first six points replicated the issues which the Western European governments used to renounce the punishment in peacetime, and the discourse presented in the Parliamentary Assembly can thus be seen as engaging with the reasons for removal outlined in the previous chapter.

However, Point 7 is a moment of departure in the proposed discourse. It affirmed that “capital punishment must now be seen to be inhuman and degrading within the meaning of Article 3 of the European Convention on Human Rights.” This was the first specific argument calling for the Parliamentary Assembly to encompass the death penalty within, and be rejected by, the *Convention* prohibition against torture.

But between 1973 and 1976 there were unfruitful discussions within the Committee on Legal Affairs. In 1973, Bergegren’s motion was sent back to the Committee on Legal Affairs for consideration, and then a newly appointed *rapporteur*, Bertil Lidgard, presented a report to the Committee and after “lengthy discussion at several meetings the committee decided, in January 1975, not to submit the report to the Parliamentary Assembly.”⁷⁸

Then in April 1975 the Parliamentary Assembly decided not to remove the issue from its register and the *rapporteur* presented an unpublished report, which stated

⁷⁷ *ibid*, Point 2.

⁷⁸ Unpublished Report submitted to the Legal Affairs Committee in 1975, cited in *Report on the abolition of capital punishment*, Doc 4509, (2nd and 3rd sittings) 22 April 1980, p. 2.

that the “abolition of the death penalty is one of those problems that involves the very principles of moral, philosophical, legal and criminological, political and other sciences.”⁷⁹ He went on to declare that the “debate on the death penalty ought...to be carried on...Attention should be drawn to various new developments as well as certain familiar arguments which militate strongly in favour of the abolition cause.”⁸⁰ Lidgard attempted to place human rights considerations on an equal footing with state policy reasons for abandoning the punishment when he stated, “capital punishment is being called into question both from the human rights standpoint and in the light of modern trends in criminology.”⁸¹ This is not insignificant because it reveals a growing confidence of the *rapporteurs* to place human rights considerations next to, and equal with, the state monopoly over its internal jurisdiction and formulation of penal sanctions.

However in 1976 the Committee on Legal Affairs frustrated Lidgard’s efforts and stated that the question of the death penalty should be “deferred.”⁸² Then he resigned as *rapporteur* and so the punishment was not debated for a further three years.⁸³ The European Ministers of Justice considered the issue at their Conference

⁷⁹ *ibid.*

⁸⁰ *ibid*, p. 3.

⁸¹ *ibid.*

⁸² *ibid*, See also, Parliamentary Assembly, Official Report of Debates, 32nd Ordinary Session, Abolition of capital punishment, Debate on the report of the Legal Affairs Committee, Doc, 4509 and amendments, (2nd and 3rd Sitzings), 22 April 1980, address during debate by Mr. Stoffelen, p. 60.

⁸³ During the debates, Mr. Grieve of the United Kingdom demonstrated the *rapporteur*’s emotion of the mid-1970s when he described Bertil Lidgard as “sorrowful” after the Legal Affairs Committee voted against he report, at *ibid*, p. 86.

held in Copenhagen,⁸⁴ and the Austrian Minister of Justice, Christian Broda, led the conference in formulating Resolution No. 4, and it recommended that the Committee of Ministers “refer questions concerning the death penalty to the appropriate Council of Europe bodies for study as part of the Council’s work programme.”⁸⁵ Then the following year, the Ministers of Justice reiterated their position but were also more pointed when they held, “Article 2 of the European Convention on Human Rights does not adequately reflect the situation actually attained with regard to the death penalty in Europe.” They recommended the Parliamentary Assembly to, “study the possibilities for the elaboration of new and appropriate European standards concerning abolition of the death penalty.”⁸⁶

The Committee on Legal Affairs *rapporteur*, Carl Lidbom, authored the next abolitionist report in 1980.⁸⁷ In his address during the Parliamentary Assembly debates on his report, he recalled that “[i]ncontestably, time was lost, for our file gathered dust on the committee’s shelves for years before anything was done.”⁸⁸ This was specific reference to the attempts within the Assembly since 1973. During

⁸⁴ European Ministers of Justice, 11th Conference, Copenhagen, 21st to 22nd June 1978.

⁸⁵ Resolution No. 4 of the 11th Conference of European Ministers of Justice on the death penalty, Copenhagen, 21st to 22nd June 1978.

⁸⁶ Ministers of Justice, 12th Conference, (Luxembourg, 20-21 May, 1980).

⁸⁷ Report, above, fn, 78.

⁸⁸ Parliamentary Assembly, Official Report of Debates, 32nd Ordinary Session, Abolition of capital punishment, Debate on the report of the Legal Affairs Committee, Doc, 4509 and amendments, (2nd and 3rd Sittings), 22 April 1980, p. 53.

the debates, Mr. Berrier of France recalled his agreement with Bergegren in 1973, and confirmed that they “had already waited too long” to agree on abolition⁸⁹

He also stated to the Assembly that “there is no doubt that abolition of capital punishment is one of the most controversial topics we can tackle, and at the same time one of the most important subjects for an organisation whose calling is to further liberty and human rights.”⁹⁰ During the debates, Mr. Koehl of France agreed when he stated that the “abolition of capital punishment is...one of the greatest issues of our time.”⁹¹

It needs to be asked, what were the issues debated in 1980 in the Parliamentary Assembly on the abolition of the punishment? The published records of the drafting debates reveal a similar outline to that put forward by Berggren in 1973, and as such, we see the prominence of the arguments, outlined previously in Chapter Three, which led to the removal of the death penalty within the individual Member States: including a the lack of special deterrent effect,⁹² the renunciation of

⁸⁹ *ibid*, p. 67; see also, for agreement to the dissatisfaction with the delay by Mr. Bardens of Germany, p. 74.

⁹⁰ *ibid*, p. 52.

⁹¹ *ibid*, 84.

⁹² *ibid*, as argued by Mr. Lidbom of Sweden, p. 53; Mr. Flanagan of Ireland, p. 56; Mr. Stoffelen of the Netherlands, p. 60; Mr. Meier of Switzerland, p. 60-61; Mr. Bacelar of Portugal, p. 62; Mrs. Hawlicek of Austria, p. 63; Mr. Reddemann of the Federal Republic of Germany, p. 65; Mr. Batliner of Liechtenstein, p. 66; Mrs. Aasen of Norway, p. 67; Mr. Bardens of the Federal Republic of Germany, p. 74; Mr. Beith of the United Kingdom, p. 80; Mr. Belin of France, p. 84; Mr. Koehl of France, p. 84.

retribution and the *lex talionis*,⁹³ the probability that innocent people have and will be executed,⁹⁴ that the punishment brutalizes society,⁹⁵ but the methods of execution by hanging and guillotine were not debated, and it is argued that the methods were considered as inhuman within the general propositions under Article 3. In recalling these arguments, Lidbom “came to realise...that the topic of capital punishment was ‘worn out from the intellectual point of view,’” and that, “advocates of the death penalty, like its opponents, have long since exhausted all their arguments.”⁹⁶ These exhausted arguments were then used to support the debated positions focusing around Articles 2(1) and 3, in that the punishment was a violation of the right to life and was thus inhuman.

He stated that he “confined himself to times of peace because I think it is realistic to proceed by stages.”⁹⁷ This is significant because it again facilitated the sovereign state choice but made the claim that the death penalty in peacetime attracts human rights considerations. In peacetime, the death penalty was no longer to be seen as an exclusive issue for the state. But he had not yet formulated a separate discourse and scattered throughout the report are moments of ambivalence. Lidbom held the view that the death penalty should be abolished because it was barbaric, but he

⁹³ *ibid*, as argued by Mr. Lidbom of Sweden, p. 53; Mr. Aksoy of Turkey, p. 57; Mrs. Hawlicek of Austria, p. 63; Mr. Batliner of Liechtenstein, p. 66; Mrs. Aasen of Norway, p. 67.

⁹⁴ *ibid*, as argued by Mr. Lidbom of Sweden, p. 53; Mr. Mercier of France, p. 55; Mr. Flanagan, p. 56; Mr. Stoffelen of the Netherlands, p. 60; Mr. Meier of Switzerland, p. 61; Mrs. Hawlicek, p. 63; Mrs. Aasen of Norway, p. 67; Mr. Urwin of the United Kingdom, p. 69.

⁹⁵ *ibid*, as argued by Mr. Lidbom of Sweden, p. 54; Mr. Stoffelen of the Netherlands, p. 60;

⁹⁶ *ibid*, p. 53, Mr. Lidbom cited the Italian criminologist, Enrico Ferri.

⁹⁷ Report, above, fn. 78, p. 5.

maintained, “it is an illusion to believe that in the present state of the world we can put an end to barbarism in times of war. Unfortunately times of war are, by definition, times of barbarism and cruelty.”⁹⁸

This was the specific beginning of the encroachment into the sovereign monopoly over the death penalty, and Mr. Ruperez Rubio of Spain declared:

we believe that nobody in this world should have a monopoly or claim the right to put an end to the life of others, not even the state.⁹⁹

Mrs Meier of Switzerland eloquently stated:

we set the right to life in the first place on the list of human rights because without this all other rights are meaningless, but if life is our most valuable possession we are not entitled, as human beings, to dispose of that of others.¹⁰⁰

Many parliamentarians agreed that the death penalty should be viewed as not only a violation of human rights but specifically the right to life.¹⁰¹

⁹⁸ *ibid.*

⁹⁹ Debate on Report, above, fn. 82, p. 71.

¹⁰⁰ *ibid*, p. 61.

¹⁰¹ *ibid*, including, Mr. Flanagan of Ireland, p. 56; Mrs Lindquist of Sweden stated, “[i]f we really mean what we say, we cannot deprive human beings of the most fundamental human right, namely, the right to life,” p. 65.

But Mr. Smith of the United Kingdom stated that “[i]t is up to each individual country at the end of the day to make its own decision,”¹⁰² and that the states themselves should grapple with the penological questions and that the Parliamentary Assembly “should stop interfering.”¹⁰³ Mr. Banks of the United Kingdom was equally vehement when he stated:

[t]he subject of the death penalty has always been left to the individual conscience of members of parliament, and I believe that it is right and proper that that should be so...I challenge the authority of the Council of Europe to submit recommendations on this very sensitive subject and to seek to impose them on the member parliaments of the Assembly.¹⁰⁴

Mr. Batliner of Liechtenstein proposed that the states should decide the issue because:

the only argument that is to some extent convincing is that of self-defence in the wider sense. In cases where the state and the community is in a sort of self-defence situation, in a case of extreme necessity, it seems to me that this kind of self-defence cannot be completely excluded in principle.¹⁰⁵

¹⁰² *ibid*, p. 58.

¹⁰³ *ibid*, p. 59, and this position was supported by Mr. Karamollaoglu of Turkey, p. 68.

¹⁰⁴ *ibid*, p. 78.

¹⁰⁵ *ibid*, p. 66.

Mr. Grieve of the United Kingdom, who was the Chairman of the Legal Affairs Committee similarly argued:

in the end it is for each country to decide what is right for its own society and whether a reserve power which, after all, has been kept by nearly all human societies since the beginning of time, should be withdrawn. I respectfully suggest that it is not for this Assembly to say that countries that still believe that it is right to retain that power are wrong and inhuman.¹⁰⁶

Mr. Michel from Belgium, argued that the Parliamentary Assembly had no business in concerning themselves in the political problems surrounding the death penalty in Member States, as it was a sovereign state issue.¹⁰⁷

A Turkish representative, Mr. Karamollaoglu, stated that he agreed with the report “in principle” but argued that it did not take into account sensitive economic, social and political circumstances in certain states in Europe. He argued that it would be inappropriate to adopt such a provision in a state where political assassination and terrorism was prolific.¹⁰⁸

¹⁰⁶ *ibid*, p. 87.

¹⁰⁷ *ibid*, p. 58-59. See also Mr. Banks of the United Kingdom, at pp. 78-9; Mr. Beith of the United Kingdom at pp. 80-81; Mr. Grieve of the United Kingdom at pp. 86-87; Mr. Michel of Belgium, p. 59.

¹⁰⁸ *ibid*, p. 57-58. Also the Mr. Karamollaoglu of Turkey, stated that he would vote against the proposition, p. 68.

Another Turkish representative, Mr. Aksoy, proposed an amendment to the effect that abolition should be promoted. His proposal intricately reflected the Member State right to choose to impose the death penalty in specific circumstances, when he maintained that the punishment “be kept during peacetime for organised murder in those states in which people are frequently assassinated by terrorist acts because of their political opinions and where the right to life of all people is thus seriously threatened.”¹⁰⁹ But Aksoy was not present at the time of the voting for his amendment, and as no other member present spoke in defence of the amendment, the chairman declared it withdrawn.¹¹⁰

As such the state issues of the choice of the death penalty were still present and this is also confirmed by Lidbom’s consideration of deterrence,¹¹¹ that miscarriages of justice may occur,¹¹² that the use of the death penalty for retribution is out-dated,¹¹³ but that human rights can now be engaged with the Enlightenment theory of the social contract.¹¹⁴

¹⁰⁹ *Amendment No. 2, to the report on the abolition of capital punishment, presented by Mr. Aksoy*, Doc. 4509, 21st April, 1980, p. 1.

¹¹⁰ Council of Europe, Parliamentary Assembly, 22 April 1980, p. 88. An amendment by Cavaliere of Italy adding the words ‘at least for political offences and for all other offences which have not intentionally resulted in the death of one or more persons’ to paragraph 2 was also withdrawn; Doc. 4509, Amendment No. 1; Council of Europe, Parliamentary Assembly, 22 April 1980, pp. 63-64, 87.

¹¹¹ *ibid*, p. 7-8.

¹¹² *ibid*, p. 11.

¹¹³ *ibid*.

¹¹⁴ Lidbom stated, “[h]uman rights theory has restated and modernised certain affirmations already made by the [Enlightenment] philosophers who based ‘sovereignty and law’ on the idea of a social contract according to which each citizen should forego some of his rights and freedoms and submit

Although he used the utilitarian arguments adopted in 1981 by the Member States in his report, it should be identified that he also attempted to push the boundaries of human rights considerations. Mrs. Hawlicek provided a cogent speech outlining all of the above arguments, and she plainly began, “[f]irstly, the death penalty is incompatible with the protection of human rights.”¹¹⁵ Indeed, Lidbom forcefully put forward that “the crucial argument is...that capital punishment is inhuman and thus incompatible with human rights” and that the death penalty:

is unworthy of any civilised nation, an appalling torment for the condemned person and a degrading and demoralising act for those who participate in or attend the execution. That is why it should be done away with.¹¹⁶

He even engaged with political philosophy and appears to state that the new social contract of 1980s Europe would not include the acceptance of the death penalty in peacetime.¹¹⁷ Furthermore, his report should be seen as a significant moment in the history of the Parliamentary Assembly’s formulation of a human rights discourse against the punishment. In many ways the time was now right to make such an argument, as in Western Europe, France was now the only country who would be likely to impose executions. The report was accepted and adopted by the

to the common will represented by the pooling of these individual rights and freedoms,” *ibid*, pp. 12-13.

¹¹⁵ *ibid*, p. 63.

¹¹⁶ *ibid*, p. 54.

¹¹⁷ The ramifications of this are explored in the thesis conclusion below.

Parliamentary Assembly and it was used as the basis for Resolution 727 which stated:

The Assembly,

1. Considering that capital punishment is inhuman
2. Appeals to the parliaments of those member states of the Council of Europe which have retained capital punishment for crimes committed in times of peace, to abolish it from their penal systems¹¹⁸

Point 1 adopted the *Convention*, Article 3 prohibition of “inhuman” punishments, and appeared to be making a *per se* claim that the death penalty is thus a violation of the Article because the punishment *is* inhuman. Such a position was a Parliamentary Assembly *opinion*, and was not supported by the drafting debates in the *travaux préparatoires*, or within the jurisprudence of the European Commission of Human Rights. Point 2 clearly aimed to reduce the scope of the punishment, as it called for a renunciation of the death penalty in peacetime. This Resolution was then referred to in a Recommendation to the Committee of Ministers, by the Parliamentary Assembly.¹¹⁹ Recommendation 891 stated:

The Assembly,

¹¹⁸ Resolution 727 (1980) *on the abolition of capital punishment*, text adopted by the Parliamentary Assembly, (3rd sitting), 22 April 1980.

¹¹⁹ Recommendation 891 (1980) *on the abolition of capital punishment*, text adopted by the Assembly on 22 April 1980 (2nd and 3rd Sittings).

1. Referring to its Resolution 727 (1980) on the abolition of capital punishment;
2. Considering that Article 2 of the European Convention on Human Rights recognises everyone's right to life, but provides that a person may be deprived of his life intentionally in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law,
3. Recommends that the Committee of Ministers amend Article 2 of the European Convention on Human Rights to bring it into line with Assembly Resolution 727(1980).

Point 1 refers back to Resolution 727, which calls for a restriction of the punishment to times of war, and although not specifically expressed in the Recommendation, but included in Resolution Point 1, the death penalty is specifically expressed as “inhuman” which would be a violation of Article 3. Here the Parliamentary Assembly is attempting to create a new discourse on the death penalty. It also restricted the scope of the death penalty and Resolution Point 2 was the first attempt within the Council to curtail the death penalty to wartime offences. In accordance with these positions an amendment of *Convention* Article 2 was proposed. Lidbom had stated in his report that “[l]egally speaking...the European Convention on Human Rights does not preclude capital punishment. Article 2 even allows it *expressis verbis*.¹²⁰ Recommendation point 3 was an attempt to rectify this, and it called on the Committee of Ministers to implement amendment.¹²¹

¹²⁰ Report, above, fn. 78, p. 13.

¹²¹ Robert Badinter, the French Minister of Justice and advocate against the death penalty viewed this period and argued the “tolerance” of Article 2(1) could only be “temporary,” see, ‘Preface – Moving

The Parliamentary Assembly was now engaging with the issues surrounding the death penalty, which the drafters of the *Convention* did not consider. Lidbom reiterated Recommendation 891, and stated:

[i]f the resolution in this report is approved by the Assembly it will be necessary to amend Article 2 of the European Convention...Any decision to amend the Convention can be taken solely by the Committee of Ministers of the Council of Europe and it is for that reason that the report proposes a draft recommendation in addition to a draft resolution.¹²²

But a proposed amendment mechanism was put forward by the Chairman of the Legal Affairs Committee, Mr. Grievés of the United Kingdom, when he argued that the Committee of Ministers could not amend the Convention text itself, but that it could draft an additional Protocol, “which would require the consent of every one of the...countries that make up our Assembly.”¹²³ They then argued because of this incorrect amendment mechanism the recommendation should not be adopted. However, even with the disagreement on the amendment mechanism, the draft resolution and recommendation were adopted. The Parliamentary Assembly initiated a dialogue with the Committee of Ministers on the issue.¹²⁴

towards abolition of the death penalty,’ p. 7, in Council of Europe, *Death Penalty: Beyond Abolition* (Strasbourg: Council of Europe Publishing, 2004).

¹²² Report, above, fn. 78, p. 22.

¹²³ *ibid*, p. 87.

¹²⁴ Resolution 727 (1980), above, fn. 118; Recommendation 891, above, fn. 119; and Report, above, fn. 78.

These provisions led to the Committee of Ministers drafting what would become the first regional treaty to call for a restriction of the death penalty to wartime application. Its significance is considered below.

4.4 The Adoption of *Protocol No. 6 to the Convention*: 1983

Protocol No. 6 to the Convention was drafted by the Committee of Ministers after it had considered the recommendations by the Parliamentary Assembly. What the protocol fundamentally aimed to achieve was a curtailment of the death penalty by reducing the unconfined scope of Article 2(1) to mandate that executions in peacetime are contrary to the *Convention*.¹²⁵ As such this protocol allowed the abolitionist Member States to confirm their commitment to a centralised, regional, instrument, not to impose the death penalty for ordinary crimes in peacetime, and at the same time encourage those Member States which had not yet restricted the death penalty to do so. *Protocol No. 6*, Articles 1 to 3 stated:

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2 – Death penalty in time of war

¹²⁵ *Protocol No. 6* above, fn. 1.

A state may make provision in its law for the death penalty in respect of acts committed in time of war or of immanent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions...

Article 3 – Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

The Commentary on the provisions of the *Protocol*, Article 1 stated that the Article should be read in conjunction with Article 2, and that the two Articles “affirms the principle of abolition of the death penalty.”¹²⁶ However, the mechanism which the protocol utilised was not specifically a “human rights” mandate to reduce the punishment. Article 2 clearly recognises the role of the state in deciding not to implement the death penalty in peacetime, and this is also confirmed in the *Preamble to Protocol No. 6* when it considers “the evolution that has occurred in several member states of the Council of Europe expresses a general tendency in favour of abolition.” Nowhere in any of the articles of *Protocol No. 6* does it state that the death penalty is contrary to *Convention* Articles 2(1) or 3, or that Article 2(1) is amended. So the agreement produced by *Protocol No. 6* was primarily reflective of the domestic penal evolution by 1981.

¹²⁶ *Explanatory Report of Protocol No. 6 to the Convention for the protection of human rights and fundamental freedoms concerning the abolition of the death penalty*, p. 6.

One area where the death penalty discourse may have significantly changed following the drafting of the protocol was the possible amendment of *Convention*, Article 2(1). *Protocol No. 6*, Article 6, states that it shall be “regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.”¹²⁷ Article 2(1) therefore still allowed for the death penalty to be applied, but following *Protocol No. 6* it appears that the scope of Article 2(1) had been restricted to wartime offences. The Committee of Ministers did not follow the Parliamentary Assembly’s Recommendation 891, that it should “amend Article 2 of the European Convention on Human Rights to bring it into line with Resolution 727.”¹²⁸ The Committee of Ministers did not allow for any specific amendment of the text itself and so *Protocol No. 6* is to be seen as applying alongside Article 2(1) from 1983.

These restricted measures must be read in context with state abolition in Western Europe. As the previous chapter outlined, the death penalty was not applied in any Western European government by 1981, and so by 1983 *Protocol No. 6* mandated a seal of approval of an already existing Western European state practice. It had not been revolutionary in its application. The Council was playing *catch-up* with state practice in that the sovereign states, as Petri-dishes of what human rights are to be protected, had already accepted this penological position. However, *Protocol No. 6* did create a symbolic *Europeanization* of state practice which is a powerful symbol and should be seen as the first time that the *Convention* human rights discourse attempt to reflected an Enlightenment position: the death penalty may be reserved

¹²⁷ Resolution 727, above, fn. 118.

¹²⁸ Recommendation 891, above, fn. 119.

for circumstances which threaten the life of the nation. The Council had for the first time attempted to rectify the inadequate position created by the inability of the drafters of the *Convention* to deal with the relationship of state sovereignty and the punishment. The *Convention* drafters had conceded too much ground on the state's side, and not enough for the human rights of the individual. Of course, the state may decide not to impose a death penalty upon such an individual, but the possibility remained in the state's arsenal.

Even though *Protocol No. 6* reflected the position of the Western European governments post-1981, some were reluctant to sign and ratify a document which would symbolise an acceptance that this was evolving into a regional norm. An example of this can be seen from a resolution adopted in the European Community, by the European Commission. In 1985 a European Commission Resolution spoke against a reluctance of some European Community Member States to sign and ratify *Protocol No. 6*.¹²⁹ Of the twelve Members States of the European Community in 1985, the Resolution noted that Ireland and the United Kingdom had not signed the Protocol,¹³⁰ and Belgium, Germany, Greece, Italy, the Netherlands and Portugal, had not ratified the Protocol.¹³¹ Point 3 states that the European Parliament “[e]xpresses its misgivings over the delay,” and Preamble E noted a regret that “the procedures for the ratification...are being carried out very slowly, which might be

¹²⁹ *Resolution on the abolition of the death penalty and the accession to the Sixth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, Doc. A2-167/85, OJ, C 36, 17/2/1986.

¹³⁰ *ibid*, Point 1.

¹³¹ *ibid*, Point 3.

considered as an expression of some hesitation on the part of those States over being bound by an international undertaking to abolish the death penalty.”¹³²

In the 1980s, during the initial activity of Resolutions within the Council and even after the signatures of *Protocol No. 6*, there was intrinsic insecurity on the part of Council Member States to relinquish part of their sovereign right of the death penalty. Chapter Three has demonstrated that the individual European states had decided to renounce the death penalty on their own, but their independence of decision was an important factor. Having an international body monitoring their application or otherwise of the death penalty was another matter. Hence, the 1980s can be seen as a period of tentative acceptance of the evolving *Convention* human rights discourse and the questioning of the death penalty. Furthermore, the lack of quick ratifications revealed that even though the regionalising of the discourse reflected what the states had already decided individually, they were cautious about the centralising process facilitated through *Protocol No. 6*. The states were aware that the ratifications would facilitate the development of a human rights “norm” against the punishment.¹³³ This is more significant than individual states renouncing the punishment by themselves and remaining separate and autonomous in their decision making.

¹³² *ibid*, Preamble E.

¹³³ See Sonia Rosena and Stephen Journey, ‘Abolition of the Death Penalty: An Emerging Norm of International Law,’ *Hamline J. Pub. L. & Pol’y* 163 (1993), pp. 166-169; and Sagmin Bae, *When the State no Longer Kills: International Human Rights Norms and Abolition of the Death Penalty*, (New York: State University of New York Press, 2007), p. 1-12.

4.5 Conclusion

The events analysed above engage with a similar historical period to the previous chapter. It has investigated the beginning of the Council discourse from the restriction of the application of the punishment in the *Extradition Convention*, to the jurisprudence of the first European Commission of Human Rights case to consider capital laws and executions, to the first report on the death penalty by the ECCP. It has also considered the discussions on the death penalty within the Parliamentary Assembly, and the adoption of *Protocol No. 6* as the first protocol which provides for the restriction of the death penalty to wartime circumstances.

When reading this chapter alongside the previous one, it is clear that the evolution of the Council's human rights discourse against the punishment significantly mirrored state parameters formulating renunciation of the punishment. It did not seek to make itself a hegemonic discourse against state policies, but sought to affirm and encourage state abolition in peacetime. *Protocol No. 6* is a landmark abolition legislation which identified the threshold of the Council's human rights standards at this time. But underneath, the Parliamentary Assembly was dissatisfied with the reach of the legislation. It argued that Article 3 should now provide a *per se* prohibition against the punishment,¹³⁴ and also that Article 2(1) should be amended. The Committee of Ministers did not endorse either of these provisions and instead progressed at the rate the Member States dictated. As such the period to 1983 can be described as a cautious evolving of the Council's human rights standards.

¹³⁴ This will be discussed further in Chapter Six below.

It was perhaps, reasonable, for the Council to initially tread carefully so that a greater degree of confidence could be formulated. Indeed, the Parliamentary Assembly can be seen to be the most confident in the development of the discourse and which will be demonstrated in the following chapters as it radically advanced the human rights parameters. Furthermore, this initial steady pace will be supported and furthered by the development of the jurisprudence of the European Commission on Human Rights and the European Court of Human Rights, and also the adoption of *Protocol No. 13* in 2002 which calls for the abolition of the death penalty in all circumstances. In the next chapter we now consider Article 2(1) and also the significance of *Protocol No. 6* and following its adoption, *Protocol No. 13* on its interpretation.

Chapter Five:
The Council Debates and the Interpretation of the Right to Life

5. The Council Debates and the Interpretation of the Right to Life

5.1 Introduction

The drafting of Article 2(1) outlined in Chapter Two revealed that at the beginning of the Council and the creation of the *Convention* system of human rights, the death penalty was an acceptable right of the sovereign Member State. It was perceived as a legitimate exception to the “right to life.” The central focus of this chapter is then to consider whether the same perception remains today and to discover whether there has been a change within the Council which now sees the punishment a violation of Article 2(1).

The Parliamentary Assembly and the Committee of Ministers debates on the application of the death penalty under Article 2(1) is analysed to determine this question. Also the case-law of the European Commission of Human Rights and the European Court of Human Rights is critiqued to determine the judicial response to the political dialogue between the Assembly and the Committee, and the resultant legislation on the issue. As such it will be investigated whether the original right of the state to impose the death penalty has been modified by an evolved interpretation of the right to life of the individual.

It will be seen that the specific text of Article 2(1) has yet to be amended, but that in juxtaposition *Protocol No. 6* provides for the abolition of the death penalty in times

of peace, and that *Protocol No. 13* provides for abolition in all circumstances. The question arises as to how the abolitionist position provided through the protocols can be reconciled with the possibility of the death penalty under Article 2(1)?

To engage with this central issue, this chapter is divided into two jurisprudential questions. Firstly, the debates on *Protocol No. 6* are considered along with the Court's jurisprudence of Article 2(1), and secondly, the debates on *Protocol No. 13* and the subsequent evolution of the case-law. The primary focus of this analysis will be to discover whether the protocols can be seen as amending Article 2(1) by implication, and whether any such amendment has affected the Member State right to choose whether or not to impose the death penalty.

5.2 The Interpretation of Article 2(1) and *Protocol No. 6*

To isolate the right to life and attempt to provide an interpretation of what it means is no easy task. James Griffin, Professor of Moral Philosophy at Oxford University, has observed that in a human rights context the right to life does not have a “clear boundary” and that what “starts off as the least problematic of rights becomes, on reflection, distinctly problematic.”¹ Similarly, the European human rights academic,

¹ James Griffin, *On Human Rights*, (Oxford: Oxford University Press, 2008), p. 213. For an analysis of Griffin's contribution to the human rights discourse, see, Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics*, (Abington: Routledge-Cavendish, 2008), p. 115-116.

Torkel Opsahl stated, “Article 2 of the Convention and the context in which it operates will show that what at first seemed simple may have problematic points.”²

We have already charted the lack of debates on the death penalty in the *travaux préparatoires* and that in the period from 1953 to 1980, the Council had not been able to identify how it wanted to attempt an interpretation of the Article. Peter Hodgkinson the Director of the Centre of Capital Punishment Studies, at the University of Westminster, noted that the interpretive difficulty of Article 2 resulted from a paradox in that the article protecting the right to life, allowed the “state to take life.”³ It is also this paradox which has resulted in the Council originally viewing the death penalty as a “problem” in the 1960s and this interpretive vicissitude has not gone away.⁴ The predominant factor which caused this conundrum was historically the sovereign had claimed the right to put to death, but the *Convention* had legislated that there was a right to life of the individual.

It has been recognised that the rectifying of the interpretive problem is of the utmost importance to the Council as Mark Janis and his colleagues argued that, “a violation

² Torkel Opsahl, ‘The Right to Life,’ p. 207, in R. St. J. Macdonald, et al, (eds), *The European System for the Protection of Human Rights*, (Netherlands: Kluwer Academic Publishers, 1993).

³ Peter Hodgkinson, ‘Europe – A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies,’ 26 *Ohio. N.U.L.Rev.* 625 (2000), p. 627.

⁴ The former Deputy Secretary General of the Council of Europe, Hans Christian Krüger also noted that the death penalty was a “problem,” see, ‘Protocol No. 6 to the European Convention on Human Rights,’ p. 88, in Council of Europe, *Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Press, 2004).

of this right makes meaningless the recognition of any other rights.”⁵ Douwe Korff has similarly stated that if a person was deprived of their “right to life, all other rights would become illusory.”⁶ Bertrand Mathieu has confirmed, “we must consider the right to life to be the primary right of every human being.”⁷

The European Commission of Human Rights and the European Court of Human Rights has developed different interpretive mechanisms for Article 2(1).⁸ Concerning the death penalty, the essential question which the Court faced was whether it should apply judicial restraint and allow the states to dictate policy on the death penalty, or whether it should utilise judicial activism and initiate new human rights standards. The Court held in *Tyrer v. United Kingdom*,⁹ that the *Convention* must not be interpreted in a vacuum and that the document is a “living instrument,” which “should be interpreted in the light of present day conditions.”¹⁰ This has been confirmed in *McCann et al, v. United Kingdom*, where the Court declared that

⁵ Mark W. Janis, Richard S. Kay and Anthony W. Bradley, *European Human Rights Law: Text and Materials*, 3rd ed, (Oxford: Oxford University Press, 2008), p. 119.

⁶ Douwe Korff, *The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights* (Human Rights Handbooks, No. 8) (Strasbourg: Council of Europe Press, 2006), p. 6.

⁷ Bertrand Mathieu, *The Right to Life in European Constitutional and International Case Law*, (Strasbourg: Council of Europe Press, 2006), p. 9.

⁸ For an overview of the interpretive mechanism which the European Court of Human Rights has adopted see, George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford: Oxford University Press, 2007).

⁹ *Tyrer v. United Kingdom*, Application Nos. 5856/72; 5775/72, 14 December 1976.

¹⁰ *ibid*, para 31.

Article 2(1) should be applied in a “practical and effective” way.¹¹ In *Vo. v. France*, it held it must be interpreted in line with “present day conditions.”¹²

This interpretive mechanism has been utilised within the development of *Convention* human rights to comprehend the widening context of the *Convention* and obligations of states towards European citizens.¹³ Alastair Mowbray noted that the European Court of Human Rights has “interpreted the Convention in such ways to encompass situations that would not have been envisaged by the framers.”¹⁴ Paul McKaskle also observed that the Court has applied the “living instrument” doctrine and “present day conditions” analysis to depart from its own previous decisions in that “the Court has found that a result it had reached at an earlier time should no longer apply because of changed conditions.”¹⁵

The living instrument doctrine is extremely important for the Court’s evolution of its interpretation of the death penalty. On this specific issue, Ann Sherlock observed “[g]iven that the Convention is a living instrument to be interpreted in the light of evolving standards and values, the scope of its obligations may develop over

¹¹ *McCann et al v. United Kingdom*, (17/1994/464/545) 27th September, 1995, para 146.

¹² *Vo. v. France*, Application No. 53924/00, 8 July 2004.

¹³ See, Alastair Mowbray, ‘The Creativity of the European Court of Human Rights,’ (2005) 5 *HRLR* 57, p. 58; Caroline Ravaud, ‘The case-law of the institutions of the European Convention on Human Rights,’ pp. 92-124, in Council of Europe, *Death Penalty - Beyond Abolition*, (Strasbourg: Council of Europe Press, 2004).

¹⁴ Mowbray, *ibid*, p. 58.

¹⁵ Paul L. McKaskle, ‘The European Court of Human Rights: What it is, How it Works, and its Future,’ 40 *U.S.F.L.Rev* 1 (2005), p. 52-53.

time.”¹⁶ In *Deweere v. Belgium*, the Court noted that the “Convention permits under certain conditions some very serious forms of treatment, such as the death penalty.”¹⁷ In *Kirkwood v. United Kingdom*,¹⁸ the United Kingdom government had argued that extradition circumstances where the person extradited would face a capital trial could not violate Article 2(1), as it specifically allowed for the punishment as an exception to the right to life.¹⁹ The Commission stated that “the provisions of Article 2(1) of the Convention...expressly recognises the ending of life through the death penalty following appropriate criminal conviction.”²⁰ In *Kirkwood* the Commission provided a literal application of Article 2(1).

However, five years later the Commission again considered the application of Article 2(1) to extradition proceedings in *Soering v. the United Kingdom*.²¹ Hans Soering was detained in the United Kingdom and the Virginian government requested his extradition to stand trial for murder. The Commission was of the opinion that there was a real prospect he would be sentenced to death and await execution on death row for six to eight years, and that he would suffer mental anguish. The Commission considered it significant that Soering was only 18 at the

¹⁶ Ann Sherlock, ‘Extradition, death row and the Convention,’ *E.L. Rev.* 1990, 15(1), 87-92, p. 92.

¹⁷ *Deweere v. Belgium*, Application No. 6903/75, 27 February 1980, para 53.

¹⁸ *Kirkwood v. United Kingdom*, Application No. 10479/83, 12 March 1984. In *Amekrane v. United Kingdom*, Application No. 5961/72, 19 July 1974. The United Kingdom reached a friendly settlement with Mrs. Amekrane, as it had extradited her husband back to Morocco for a capital crime and he was executed.

¹⁹ *Kirkwood v. United Kingdom*, Application No. 10479/83, 12 March 1984, para. 183-4.

²⁰ *ibid*, para. 188, 190.

²¹ *Soering v. the United Kingdom*, Application No. 14038/88, 19 January 1989.

time of the crime that he suffered from the mental condition “folie a deux”, and the extreme conditions of death row in the State of Virginia were enhanced by prolonged incarceration of up to eight years.²² The Commission relied on the interpretation of Article 2(1) that it established in *Kirkwood*, and held that Soering could be extradited to the State of Virginia to face a capital trial. The Commission did not apply any evolutive interpretation to move away from the *Kirkwood* decision, but on appeal to the European Court of Human Rights a different judicial approach was adopted.

Before *Protocol No. 6* was adopted in 1983, the European Court of Human Rights had not considered the specific question of the amendment of Article 2(1). But when *Soering* reached the European Court of Human Rights, the Court sought to evolve its jurisprudence. In 1989, thirteen Member States of the Council of Europe had signed and ratified *Protocol No. 6* (but not the United Kingdom)²³ and so the question arose as to how Article 2(1) was to be balanced against the Protocol. The Court considered the issue at length and stated:

[s]ubsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under Article 2(1)...However, Protocol No. 6, as a subsequent written agreement, shows that

²² Both the Commission and the Court situated the most important analysis of this case under *Convention* Article 3 and this is considered in the next chapter.

²³ *Soering v. United Kingdom*, Application No. 14038/88, decision, 7th July, 1989, para, 103; The then thirteen ratifying states were: Austria, Denmark, France, Germany, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, (San Marino), Spain, Sweden, Switzerland.

the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an agreement.²⁴

The Court in effect determined that the location of the right to decide whether or not to apply the death penalty ultimately resided with the Member States. State choice was predominant ensuring that the amendment of Article 2(1) was only possible through explicit Member State agreement. Alastair Mowbray has argued that the Court wanted to display a legitimate basis for its decision,²⁵ thus providing an “important limitation on the use of the ‘living instrument’ doctrine.”²⁶ The Court stated that there was not a consensus for saying that Article 2(1) had been abrogated.²⁷ It therefore applied judicial restraint in order to reinforce the notion that this was a matter for Member States.

²⁴ *ibid.* In considering the harmony of *Convention* Article 2(1) and *Protocol 6*, Article 1, no other case law was referred to, and *Soering* can be seen as the first time the European Court of Human Rights considered the death penalty as an Article 2(1) issue.

²⁵ See, Mowbray, above, fn. 13, pp. 58, 66-69. For a general discussion of the question of the legitimacy of the Court’s judgments when it departs from the drafter’s intentions, see Lawrence Helfer, ‘Consensus, Coherence and the European Convention on Human Rights,’ 26 *Cornell Int’l L. J.* (1993) 135.

²⁶ *ibid.*, p. 66

²⁷ *Soering* above, fn. 23, para 103.

At this time the *Protocol No. 6* signatories and ratifications had not amounted to a “norm” in *Convention* human rights. Sangmin Bae has conducted research on norm development within international human rights and the death penalty and she is of the opinion that, “the norm against the death penalty is a ‘hard’ case.”²⁸ Illustrating the hard case, Bae has argued that norm creation in the death penalty is an extremely complex and difficult exercise. The Court looked for Member States unanimity to enable it to present an interpretation that Article 2(1) had been amended. It appeared that universal state acceptance is required for the creation of a legal “norm” against the death penalty.

As such the Court did not succumb to the fears of the former *registrar* of the Court, Paul Mahoney, of the possibility of the Court making law.²⁹ Although Lawrence Helfer and Anne-Marie Slaughter have argued that the Council possesses the power of supranational adjudication and that it is “empowered to exercise some of the functions otherwise reserved to states”³⁰ the Court held back and allowed the amendment of Article 2(1) to remain a question for the Member States. Human rights in this respect did not trump the sovereignty of states.

²⁸ Sangmin Bae, *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment*, (Albany: SUNY, 2007), p. 109.

²⁹ Paul Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism’ 19 *HRLJ* (1998) 2; *ibid*, ‘Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: two sides of the same coin,’ 11 *HRLJ* (1990) 57.

³⁰ Lawrence Helfer and Anne-Marie Slaughter, ‘Towards a Theory of Effective Supranational Adjudication,’ 107 *Yale. L.J.* 2, (1997), p. 287.

The political debates and jurisprudence concerning Article 2(1) reveals that the *locus* of the authority to dictate the final decision of whether or not to apply the death penalty is identified through a process of Committee of Ministers legislating protocols and then the acceptance or rejection of the provisions of the protocols by the Member States, and finally the Court's adjudication on this legislative and ratification process. The Court's analysis is necessary, and will continue to be, because the issue of *Protocol No. 6* and the extent of Article 2(1) is still open for debate.

In his 1980 Report for the Parliamentary Assembly, Carl Lidbom stated that it was the Committee of Ministers who could only amend the *Convention* text itself,³¹ and *Soering* agreed to this amendment process. This displays that the driving force behind where the right of the death penalty is located is in different power determinates, but in 1989, the Committee of Ministers and the Court thought that the ultimate authority presided with the state. Chapters Two and Three identify that it is a sensitive political project to engage the sovereign states in relinquishing such an intrinsic component of its right, and the human rights standards were carefully being applied to this issue. But Judge De Meyer held the view that the *Soering* Court should have gone further and he stated in his concurring opinion that:

[t]he second sentence of Article 2(1) of the Convention was adopted nearly forty years ago, in particular historical circumstances, shortly after the Second World War. In so far as it still may seem to permit, under certain conditions,

³¹ *Report on the abolition of capital punishment*, Doc. 4509, (2nd and 3rd sitting), 22 April 1980, p.

capital punishment in times of peace, it does not reflect the contemporary situation, and is now overridden by the development of legal conscience and practice.³²

Judge De Meyer's concurring opinion is more strongly worded than the majority's and it echoed the Parliamentary Assembly resolutions and recommendations. In effect, he was arguing that the Member States had arrived at a better understanding of the penal issues of the death penalty, which can be compared to the Court's reasoning in *Dudgeon v. United Kingdom*, when it stated "[a]s compared with the era when that legislation [making homosexually illegal] was enacted, there is now a better understanding."³³ George Letsas, the European human rights scholar, views the importance of the Member States endeavouring to develop "better" legislation as he argues "it is not enough to there being a different understanding evolved, this understanding must also be better, ie, towards the truth of the substantive protected right."³⁴

Even though the *Soering* Court did not hold that the Member States had agreed to amend Article 2(1), it is evident that the states were formulating a collective understanding of more effective penal policy. Whilst the Court did observe this

³² *Soering*, above, fn. 23, p. 51.

³³ *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981, para 60

³⁴ George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford: Oxford University Press, 2007), p. 79; Michel Foucault has observed that in the Enlightenment the European governments were searching for ways to not "punish less, but to punish better", in *Discipline and Punish: The Birth of the Prison*, (London: Penguin, 1976), p. 73. It appears that this is an ever evolving European governmental quest.

development, it did not see that it had a judicial function in furthering this new penal perspective. It merely observed what was happening in 1989.³⁵ However, the Parliamentary Assembly endeavoured to contribute to the search through the eradication of the deficiencies within *Protocol No. 6*. Renate Wohlwend, the former *rapporteur* for the Committee on Legal Affairs, stated in her *Explanatory Memorandum* that Protocol No. 6 had three essential weaknesses, in that firstly it did not abolish the death penalty in times of war or imminent threat of war, secondly that it provided no formal obstacle to a reinstating of the death penalty, and finally that it did not amend Article 2(1).³⁶ Stephano Manacorda, the human rights scholar, noted the weaknesses of *Protocol No. 6* and added that the death penalty could be applied “in the threat of war” and that there is “no mention of the seriousness and the nature of the offence.”³⁷

The Parliamentary Assembly wanted the Committee of Ministers to eradicate these weaknesses and formulate a *better* protocol which would seek to abolish the death penalty in all circumstances. With the introduction of new legislation, the Court may then have to reassess the status of Article 2(1).

³⁵ It is argued that the Court was more proactive under its Article 3 analysis and this is considered in the next chapter.

³⁶ *Report: Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances*, Parliamentary Assembly, Doc. 9316, 15 January 2002, Explanatory Memorandum, para 3.

³⁷ Stephano Manacorda, ‘Restraints on Death Penalty in Europe: A Circular Process,’ *JICJ* 1, 263 (2003), p. 274.

5.3 The Interpretation of Article 2(1) and *Protocol No. 13*

In Recommendation 1246 (1994), the Parliamentary Assembly deplored the fact that eleven Member States had the death penalty as a possible legal punishment.³⁸ Paragraphs 4 and 5 outlined the failure of the deterrent effect of the death penalty and that innocent people may be executed, and that for these reasons, the death penalty should not apply even in wartime. The Parliamentary Assembly recommended that the Committee of Ministers “draw up an additional protocol to the European Convention on Human Rights, abolishing the death penalty both in peace- and wartime.”³⁹ In its interim reply to Recommendation 1246, the Committee of Ministers noted that it would “examine” the Parliamentary Assembly’s recommendations, and also emphasised that the Committee of Ministers “encouraged member states which have not abolished the death penalty to operate de facto or de jure a moratorium on the execution of death sentences.”⁴⁰

However by 1996 the Committee of Ministers still had not responded to Recommendation 1246 and the Parliamentary Assembly then adopted Recommendation 1302 (1996),⁴¹ which welcomed the Committee’s encouragement of moratoria, but regretted “that the Committee of Ministers has not yet taken any

³⁸ Recommendation 1246 (1994) *on the abolition of capital punishment*, text adopted by the Assembly on the 4th October 1994 (25th sitting), para 1.

³⁹ *ibid*, para 6(i).

⁴⁰ *Interim reply to Recommendation 1246 (1994) on the abolition of capital punishment*, Doc. 7466, adopted on 22 January 1996.

⁴¹ Recommendation 1302 (1996) *on the abolition of the death penalty in Europe*, text adopted by the Assembly on 28 June 1996 (24th sitting).

action on the most important proposals, contained in paragraph 6 of this recommendation.”⁴² The regret was focused on the fact that the Committee had not drafted a specific protocol to amend Article 2(1).

To further confirm the point the Assembly recommended “that the Committee of Ministers follow up the proposals of Recommendation 1246 (1994) without further delay.”⁴³ Paragraph 3 highlighted the frustrations within the Parliamentary Assembly. It was not satisfied with the Committee dragging its feet on the new protocol, and called for complete abolition and a greater monitoring of Member States which imposed the punishment. Then in 1997, the Committee put forward an interim reply to Recommendation 1302,⁴⁴ stating that it “fully shares the concern voiced by the Parliamentary Assembly,” but that the Committee also considered:

Bearing in mind that, at *national level*, *parliaments and governments share responsibility* regarding the abolition of the death penalty.

a. It welcomes the constructive dialogue that has been developed between the Committee of Ministers and the Parliamentary Assembly concerning this issue and would emphasise its strong commitment to pursue this *dialogue on the abolition of capital punishment in all member states* of the Council of Europe.

⁴² *ibid*, para 2.

⁴³ *ibid*, para 3.

⁴⁴ Reply to Recommendation 1246 (1994) and 1302 (1996) of the Parliamentary Assembly, 555th meeting (January 1996) and 588th meeting (April 1997).

...

d. The Committee of Ministers considers that the process of monitoring compliance with commitments accepted by *member States of the Council of Europe can contribute, in a spirit of dialogue and co-operation*, to the process of putting an end to capital punishment. It also considers that the Parliamentary Assembly has an important role to play in this regard (emphasis added).

This interim reply clearly reveals that the Committee considered the sovereignty of Member States to be of crucial importance in the development of abolition strategies against the death penalty. Abolition was the goal, but to be effective, it must come from a “spirit of dialogue” with the Member States. What this appears to demonstrate is that the Committee were intertwined within the historical, and contemporary, political issues surrounding sovereignty and the state right of the punishment. The Assembly was attempting to expand the boundaries of human rights, but the Committee placed a demarcation because of political considerations.

This example can be placed in a more general context. Danny Nicol noted that the Parliamentary Assembly was “enthusiastic” in the drafting of human rights legislation but the Committee of Ministers was more “cautious.”⁴⁵ This can be seen in the above examples on the death penalty. But then in 1998, the Committee replied to both Assembly Recommendations, and stated that it:

⁴⁵ Danny Nicol, ‘Original intent and the European Convention on Human Rights,’ *P.L.* 152 (2005), p. 154.

considers that the priority is to obtain and maintain moratoria on executions, to be consolidated by complete abolition of the death penalty. In exercising influence to this end, it considers it important to act in partnership and constructive dialogue with the Assembly, particularly in view, on the one hand, of the essential responsibility of the legislator in this field and on the other of the need to sensitise public opinion.⁴⁶

The Committee, at this stage, did not engage with the specific paragraphs of the Assembly Recommendations, but merely reinforced its commitment against the death penalty. It joined the Assembly in this endeavour. It should also be understood that what the Committee were affirming through emphasising the maintenance of “moratoria” was the state internal consideration of the suspension and removal of the punishment. It considered the issues surrounding the death penalty required more careful attention of Member States issues, and there was unease at hastily creating the protocol. Although it favoured abolition it was hesitant in its role as Council legislature, to impose punishment criteria on Member States. But the push to create a new protocol did not abate. At the Ministerial Conference held in Rome on 3-4 November 2000, a further Resolution was adopted inviting the Committee of Ministers:

⁴⁶ *Abolition of capital punishment, reply to Recommendation 1246 (1994); Abolition of the death penalty in Europe, reply to Recommendation 1302 (1996)*, adopted, 16th April 1998 at the 628th meeting of the Minister’s Deputies, Doc 8079, 21 April, 1998.

to consider the feasibility of a new additional protocol to the Convention which would exclude the possibility of maintaining the death penalty in respect of acts committed in time of war or of immanent threat of war.⁴⁷

Following this Resolution, the Committee adopted a “Declaration for a European Death Penalty-Free Area.” It stated that the achievement of abolition of all Member States was “our common goal.”⁴⁸ This was not quite the same as specifically stating that the Committee would adopt a protocol in order to abolish the death penalty in wartime, or that, even, Article 2 (1) would be amended. Then the Rapporteur Group on Human Rights submitted the *Draft Protocol for the abolition of the death penalty in all circumstances*.⁴⁹ The text called for abolition in all circumstances but no provisions were included which specifically amended Article 2(1). It considered and accepted the draft and *Explanatory Report* and presented it to the Assembly for opinion.⁵⁰

In her “Explanatory Memorandum” to the *Draft Protocol*, Renate Wohlwend, noted initially that “the Assembly has expressed its contempt for the death penalty for

⁴⁷ Paragraph 14 (ii) of Resolution IIB (2000).

⁴⁸ *Declaration “For a Death Penalty-Free Area”* adopted by the Committee of Ministers, 9th November 2000, 107th Session.

⁴⁹ *Draft Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, Ministers’ Deputies Meeting (773rd meeting) 21 November 2001.

⁵⁰ *European Convention on Human Rights – Draft Protocol No. 13 on abolition of the death penalty in all circumstances*, Parliamentary Assembly, Doc. 9291, 14 December 2001.

decades,”⁵¹ and that the first official Assembly initiative to abolish the death penalty was Recommendation 891 (1980). However, the Protocol did not include such provision. The Opinion on the Draft Protocol stated that the unsatisfactory situation of Article 2(1) remained under the draft and that:

5. The second sentence of Article 2 of the European Convention on Human Rights still provides for the death penalty. It has long been in the interests of the Assembly to delete this sentence, thus matching theory with reality. This interest is strengthened by the fact that more modern national constitutional documents and international treaties no longer include such provisions.

6. In consequence the Assembly recommends to the Committee of Ministers that, in the interest of updating the European Convention on Human Rights as such on this important matter, a second paragraph be added to Article 5 of the draft protocol (“Relationship to the Convention”) worded as follows:

When this Protocol has come into force in all States Parties to the Convention, the second sentence of Article 2 paragraph 1 of the Convention shall be replaced with the text of Article 1 of this Protocol, and in the first sentence of

⁵¹ *Explanatory Memorandum*, by Mrs. Renate Wohlwend, *rapporteur*, point, 1, in *Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances*, Doc. 9316, 15 January, 2002.

Article 47 of the Convention, after the words ‘provision of the Convention’ the words ‘except for Article 2, paragraph 1’ shall be added.⁵²

Wohlwend indicated that *Protocol No. 13* was an opportunity to finally amend Article 2(1) and along with the ratification, and the process of abolishing the death penalty in all circumstances, the Member States could signal a simultaneous acceptance of an amendment to the Article.⁵³ However, the Committee of Ministers, in the final drafting of *Protocol 13*, did not include Wohlwend’s provisions of a “hybrid protocol,”⁵⁴ and the *rapporteur* in paragraphs 9-10, strongly questioned:

are we then going to draw up another (the third!) Protocol on the same subject – the abolition of the death penalty – in order to at long last amend Article 2 of the Convention itself? In treaty law, this is a very inelegant solution...I would suggest a “hybrid” Protocol, which starts out as an additional Protocol, and becomes an amending Protocol when it has entered into force in all State Parties to the Convention.

This seemingly unimpeachable approach was not followed by the Committee of Ministers as they would not “think the unthinkable.”⁵⁵ As a result, the Council may now have to adopt the “inelegant solution” of drafting a further protocol in the

⁵² *Opinion No. 233 (2002), Draft protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances*, 1st Sitting, Assembly Debate, 21 January 2002.

⁵³ See, Explanatory Memorandum by Mrs Wohlwend, Rapporteur, above, fn. 51, paras. 1-12.

⁵⁴ *ibid*, para 10.

⁵⁵ *ibid*, para 2.

future. In this context Wohlwend's observation would support the argument that the theoretical possibility of the death penalty remains. She indicated the problematic circumstance as some Member State's parliaments demonstrate the sovereign right to internal jurisdiction. She observed:

[c]oncerning the inclusion of an obligation for signatories not to re-introduce the death penalty, one might argue that this is not necessary, since there is no withdrawal clause in the draft Protocol. *It might also not be politically opportune to add such an obligation, since some countries will always insist that their parliaments should be at complete liberty to have the final say in this matter* (emphasis added).⁵⁶

On the issue of reintroduction of the death penalty, Wohlwend conceded the question of sovereign internal jurisdiction. Such an observation would be in accordance with the sentiments of the Committee of Ministers and the European Court of Human Rights in *Soering* on identifying a prominent role of the sovereign state within the abolition process. But the exchange of opinions between the Assembly and the Committee on the status of Article 2(1) and its possible amendment, displayed that the Assembly did not want to allow the Member States to rest on this political position. It attempted to close the door on state application by achieving a textual amendment of Article 2(1). However, the Rapporteur Group on Human Rights considered the Assembly's Opinion and stated:

⁵⁶ *ibid.*

[w]ith regards to the Assembly's Opinion the Group, whilst welcoming its strong political support for such a protocol, came to the conclusion that it was not advisable to accede to the Recommendation...In the Group's view such an amendment would present only limited interest given that the purported legal effect in respect of Article 2, ECHR will in practice also be achieved through an additional protocol. Furthermore, the amendment could, in the opinion of the [Rapporteur Group on Human Rights], give rise to some legal questions, not least with regard to territorial declarations and reservations, extending beyond the scope of the consideration of the protocol itself, which could delay unduly the adoption of this important text.⁵⁷

The Rapporteur Group on Human Rights were advancing complex legal arguments which had the effect of thwarting the efforts of the Parliamentary Assembly. The Group was of the opinion that *Protocol No. 13* would amend Article 2(1) by implication, and that the "purported legal effect" will be achieved "in practice." However, such an interpretation seems to be irreconcilable with *Protocol No. 13*, Article 5 on the relationship of the protocol with the *Convention* as it stated that the "Protocol shall be regarded as additional articles to the Convention," but not that it amends the *Convention*. Furthermore, the final *Commentary on the provisions of the Protocol*, on Article 5, confusingly stated:

⁵⁷ *Reference Documents: 4.5 European Convention on Human Rights, Draft Protocol No. 13 on the abolition of the death penalty in all circumstances*, Ministers' Deputies Meeting (784th Meeting), 21 February, 2002, sixth unnumbered paragraph.

[a]s an additional Protocol, it does not, as far as the Parties to the Protocol are concerned, supersede Article 2 of the Convention, since the first sentence of paragraph 1 and the whole of paragraph 2 of that article still remain valid...It is clear that the second sentence of paragraph 1 is no longer applicable in respect of the States Parties to this Protocol.⁵⁸

Although the Commentary proposed that “the second sentence of paragraph 1 is no longer applicable,” the Protocol nevertheless allowed Article 2(1) to preserve the possibility of the death penalty within the main text of the *Convention*. The Committee allowed this complex human rights position for two reasons: both relating to Member State’s opinions of such an amendment. Firstly, it presumed that the amendment of Article 2(1) would only be of “limited interest” to the signatories, and secondly, that the proposal of such amendment may “give rise to some legal questions, not least with regard to territorial declarations and reservations.” As discussed in Chapter Two, the territorial considerations have been a central factor of the sovereignty of states since their creation following the Treaty of Westphalia in 1648, so the importance of the recognition of state issues should not have been underestimated.

In the final draft wording of *Protocol No. 13*, the Committee did not adhere to the Parliamentary Assembly’s requests and recommendations to amend Article 2(1), but sought to renounce its application without providing for amendment. This was a

⁵⁸ *Protocol No. 13 to the Convention for the protection of human rights and fundamental freedoms, concerning the abolition of the death penalty in all circumstances*, Vilnius, 3 May, 2002, Commentary on the provisions of the Protocol, Article 5: Relationship to the Convention.

political middle-way. However, the Preamble to *Protocol No. 13* states, “everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right.” Wishing to strengthen the protection of the right to life, Article 1 states that the “death penalty shall be abolished. No one shall be condemned to such penalty or executed.”

The right to life is stated twice in the preamble, although not in the Protocol Articles, and furthermore, *Convention* Articles 2(1) or 3 are not specifically referred to. The important question remains as to why Article 2(1) was not amended if the right to life is such an intrinsic aspect of the protocol? The *Explanatory Report* point 1, refers to the European Court of Human Rights judgment in *Streletz, Kessler and Krenz v. Germany*, which held that the right to life is “an inalienable attribute of human beings,” and that this right possesses “supreme value in the international hierarchy of human rights.”⁵⁹ Nowhere is it stated that ‘life’ itself is inalienable, only that it is an “inalienable attribute.” An attribute is an aspect of something and not the essence of it, and here we see the root issue again. Can the right to life be used as an *end* to eradicate the death penalty, or is it only a *means* with which to challenge the punishment?

Protocol No. 13, Article 2, states “No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.”⁶⁰ If the states wish to

⁵⁹ *Streletz, Kessler and Krenz v. Germany*, Application Nos. 34044/96; 35532/97; 44801/98, 22 March 2001, paras, 72, 85, 87 and 94.

⁶⁰ *Protocol No. 13*, above, fn. 58, Article 2 – Prohibition of Derogations, “No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.”

impose the death penalty if the life of the state is threatened then the prohibition of derogation would potentially be nullified. This is because *Convention*, Article 15 authorises the Contracting states, “in time of war or other public emergency threatening the life of the nation,” to derogate theoretically, and at least, reintroduce the death penalty. This would be inapplicable under *Protocol No. 13*, Article 2. But if the life of the nation is threatened, then ultimately, the state will have a choice. This may be more an extreme hypothetical than political reality, but it should be observed that the possible legal loophole remains.

Stephano Manacorda highlighted Italy’s previous reservation and stated that even under *Protocol No. 13*, the “residual role of the death penalty” has been exploited through reservations.⁶¹ Allowing the death penalty in wartime does not encompass all threats challenging the nation, such as states of emergency. In the specific example of Turkey, Mehmet Gemalmaz argued that there may have been a loophole for Turkey to reintroduce the death penalty outside war circumstances, in that the Turkish Constitution, Article 38 provided for the death penalty for the “crime of

⁶¹ Manacorda, above, fn. 37, p. 274. Georgia declared that until the full jurisdiction of Georgia is restored on the territories of Abkhazia and Tskhinvali Region, it cannot be held liable for the violations on these territories of the provisions of *Protocol No. 13*; Moldova declares that, until the full re-establishment of the territorial integrity of the Republic of Moldova, the provisions of the Protocol shall be applied only on the territory controlled effectively by the authorities of the Republic of Moldova, see list of declarations made with respect to *Protocol No. 13*.

<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=187&CM=8&DF=3/10/2008&CL=ENG&VL=1> (last accessed, 3rd March 2008).

terror” which, he argued, was not recognised under *Protocol No. 6*.⁶² On similar lines, Andrew Clapham has observed that, “we cannot absolutely discount the possibility that states may in the future try to denounce the 6th or 13th Protocols.”⁶³ The question will be one of degree, as to whether the life of the state can be maintained by the incarceration of threatening individuals or if it is argued to be necessary to execute them.

The European Court of Human Rights has confirmed that even with *Protocol No. 13*, the Council has not yet managed a specific amendment of the Convention text. In *Öcalan v. Turkey*,⁶⁴ Turkey had imposed a death sentence on Abdullah Öcalan, the leader of the PKK (Kurdistan Worker’s Party)⁶⁵ for the Kurdish uprisings and forming an army “in order to destroy the integrity of the Turkish state.”⁶⁶ Öcalan

⁶² Mehmet Gemalmaz, ‘The Death Penalty in Turkey (1920-2001): Facts, Truths and Illusions,’ (2002) 13 *Crim. L. Forum*. 91, p. 122.

⁶³ Andrew Clapham, ‘Symbiosis in International Human Rights Law: The *Öcalan* case and the Evolving Law on the Death Sentence,’ *JICJ* 1, (2003) 475, p. 450.

⁶⁴ *Öcalan v. Turkey*, Application No. 46221/99, 12 March 2003.

⁶⁵ For an outline of the history of the Kurdistan Worker’s Party see, Hanz Chiapetta, ‘Rome, 11/15/1998: Extradition or Political Asylum for the Kurdistan Worker’s Party Leader Abdullah Öcalan,’ (2001) 13 *Pace Int’l L. Rev* 117. For a review of the legal and political policies adopted by Turkey in an attempt to join the European Union, see David Kanarek, ‘Turkey and the European Union: The Path to Accession,’ (2003) 9 *Colum. J. Eur. L.* 457.

⁶⁶ Mirja Trilsh and Alexandra RÜth, ‘Case Comment: *Öcalan v. Turkey*, 100 *A.J.I.L.* 180 (2006), p. 180; Ann Sherlock, ‘Case Comment: *Öcalan v. Turkey* (46221/99)(unreported, December 14, 2000),’ *E.L. Rev.* 133 (2001). Sherlock’s note was on the admissibility stage of the trial, and see also, William Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed, (Cambridge: Cambridge University Press, 2002), pp. 277-279.

had fled Turkey and sought refuge in Greece and Italy, before hiding in Kenya. He was arrested in Nairobi and extradited back to Turkey to face a capital trial and was sentenced to death. This was the first case to come before the European Court of Human Rights to involve a Member State's application of the death penalty, as Sir Sydney Kentridge, one of the lawyers for Abdullah Öcalan, pointed out in his opening statement:

[t]his is one of the most significant and high-profile cases ever to come before the European Court of Human Rights....it is a case in which the passing and proposed implementation of the death penalty within a signatory state has resulted in litigation before the court.⁶⁷

The *Öcalan* Chamber noted the Parliamentary Assembly's Opinion No. 233 (2002) on the *Draft Protocol No. 13*, and specifically cited paragraph 5 when the Assembly stated concerning the second sentence of Article 2 (1) that, "[i]t has long been in the interest of the Assembly to delete this sentence, thus matching theory with reality."⁶⁸ This demonstrates that the Chamber was specifically engaging with the dialogue between the Parliamentary Assembly and the Committee of Ministers on the amendment of Article 2. Following this Parliamentary Assembly position and the ratifications of *Protocol No. 6* and *Protocol No. 13*, it was argued for the applicant that "the practice of the Contracting States in this area can be taken as

⁶⁷ Cited by Colin Wells, who was an observer at the trial, see, 'Human Rights in Turkey: Death by State Hanging,' (2003) 9 *Amicus Journal* 8, p. 9.

⁶⁸ *Öcalan v. Turkey*, above, fn. 64, para. 189.

establishing an agreement to abrogate the exception provided for in the second sentence of Article 2(1).”⁶⁹

However, the Chamber in *Öcalan* followed the reasoning in *Soering*, that the normal method of *Convention* amendment is through state practice in signing and ratifying optional protocols. So ultimately, amendment must be initiated by the Committee of Ministers and accepted by the states.⁷⁰ It is worth considering the *Öcalan* Chamber judgment, paragraphs 196-8. The Court held:

[s]uch a marked development could now be taken as signalling the agreement of the Contracting States to abrogate, or at the very least to modify, the second sentence of Article 2 (1), particularly when regard is had to the fact that all the Contracting States have now signed Protocol No. 6 and that it has been ratified by forty-one States. It may be questioned whether it is necessary to await ratification of Protocol No. 6 by the three remaining States before concluding that the death penalty exception in Article 2 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable, if not inhuman, form of punishment which is no longer permissible under Article 2.

In expressing this view, the Court is aware of the opening for signature Protocol 13 which provides an indication that the Contracting States have chosen the traditional method of amendment of the text of the Convention in

⁶⁹ *ibid.*

⁷⁰ *ibid*, para 191.

pursuit of their policy of abolition. However this Protocol seeks to extend the prohibition by providing for the abolition of the death penalty in all circumstances – that is to say both in times of peace and in times of war. This final step toward complete abolition of the death penalty can be seen as a confirmation of the abolitionist trend established by the practice of the Contracting States. It does not necessarily run counter to the view that Article 2 has been amended in so far as it permits the death penalty in times of peace.

In the Court's view, it cannot now be excluded, in the light of the developments that have taken place in this area, that the States have agreed through their practice to modify the second sentence in Article 2(1) in so far as it permits capital punishment in peacetime.

The court's language is imprecise and does not say simply and categorically, that Article 2(1) is amended. It outlines the fact that the development of abolition in Member States, "could," and "can," but "does not necessarily run counter" to the signalling to "abrogate" Article 2(1). Then the Chamber held that "it can" be said that the death penalty is "unacceptable" in peacetime.

The Chamber was of the opinion that the final determination is a state choice issue, as concerning the signature of *Protocol No. 13* that the, "Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition." The Chamber also states that the death penalty has come to be "unacceptable, if not inhuman" in peacetime, but not that it is a violation of Article 2(1) or the right to life.

As such, the Chamber affirmed that the appropriate jurisprudential analysis is adopted by viewing the actions of the Member States. It specifically identified “their policy,” in that the “abolitionist trend established by the practice of the Contracting States,” was predominant because the “States have agreed through their practice” to renounce the punishment. Hence, this decision can be seen as a jurisprudential acceptance of the development of the Western European practice post 1981 which is also reflected in *Protocol No. 6*, that the death penalty is an illegitimate punishment in peacetime. The Chamber held that the ratifications of *Protocol No. 13* did not yet create a *per se* rule for Member States in 2003.

Alastair Mowbray has affirmed that the Chamber was “circumspect in applying the ‘living instrument’ doctrine to determine the (il)legality of the death penalty,” and as such the Chamber “would not unequivocally rule that the State’s contemporary practice had modified Article 2(1).”⁷¹ The partly dissenting opinion of Judge Türmen furthers the argument. He stated:

[it] is true that all Contracting States have now signed Protocol No. 6 and 41 of them have ratified it. However, such a development cannot be taken as signalling the agreement of the Contracting States to abrogate the exception in Article 2(1). The existence of such an agreement would require clear evidence over and above the uniform amendment of penal policy in favour of abolition.

⁷¹ Mowbray, above, fn. 13, p. 67.

Such evidence is, however, lacking. It still remains the practice of the States to amend the Convention in pursuit of their policy of abolition by an optional instrument allowing each State to choose the moment when to undertake such an agreement. The most recent example is the opening for signature of Protocol No. 13 to the Convention, which amends the Convention by providing for the abolition of the death penalty in all circumstances – that is to say, both in times of peace and times of war.

In the Preamble to Protocol 13, the Member States of the Council of Europe signatory to the Protocol indicate their wish to strengthen the protection of the right to life in the Convention, expressly take note that Protocol No. 6 does not exclude the death penalty in respect of acts committed in times of war and resolve to take the final step in order to abolish it in all circumstances.

Such language runs directly counter to the suggestion that the States have, through their practice, already taken “the final step” towards abolition. In reality there is no basis for the view that this new Protocol represents the treaty confirmation of any previous agreement between the States to complete abrogation – only partially achieved in Protocol No. 6 – of the exception contained in Article 2(1). Against such a clear background, the conclusion reached in the judgment that the exception in Article 2(1) is abrogated is not tenable.

Accordingly, Article 2(1) must still be read as permitting the imposition of the death penalty.⁷²

Andrew Clapham has argued that the “implication could... be drawn that a death penalty which results from a fair trial is indeed permissible.”⁷³ Even with the presence of *Protocol No. 6* which abolishes the death penalty in peacetime, and *Protocol No. 13* which abolishes the death penalty in all circumstances, the death penalty is still possible in restricted circumstances.

This decision also affirms that the *Explanatory Report* and the Rapporteur Group on Human Rights were not completely accurate on the extent of *Protocol No. 13*. It appears that the lack of express reference to Article 2(1) is the “clear evidence” which Judge Türmen required, but which the Rapporteur Group thought was not necessary. Furthermore, there was a lack of unanimity in that only thirteen states had ratified *Protocol No. 13* in 2003. A consensus of the states is required to demonstrate consent on the issue in creating a “norm” against the death penalty.⁷⁴ Significantly, it was the “agreement of the Contracting States” which was identified to be the determining factor, and that each state should “choose the moment” and as such there was “no basis” to suggest that Article 2(1) was amended. Trilsh and

⁷² *Öcalan v. Turkey*, above, fn. 64, para. 70.

⁷³ Clapham, above, fn. 63, p. 482.

⁷⁴ Jens David Ohlin has argued that when states have not ratified international agreements against the death penalty that they “have not consented to withdrawing capital punishment from their penal systems,” and that “[u]nder the [consent model] the human right to life is applied only against a state that has voluntarily agreed to be bound by the legal norm,” in ‘Applying the Death Penalty to Crimes of Genocide,’ 99 *A.J.I.L* 747 (2005), p. 773.

Rüth's observation that the "final step toward complete abolition had yet to be made,"⁷⁵ is to be understood in this context.

Judge Türmen recognised the issue of state choice as he identified, "by an optional instrument allowing each State to choose the moment," of signature and ratification. But this leaves the possibility of the state reversing its choice. Human rights merely strengthens "the protection of the right to life," so the strengthening reveals that life is not inalienable. This is in apparent contradiction to what is maintained in the Preamble to *Protocol No. 13*. Judge Türmen also made reference to the Preamble, noting that "the final step," had not been taken, but it is difficult to see how the final step could be taken if the Committee does not legislate for this possibility. It is for the Committee to open the door, and then it will be for the states to consider. But it also appears that Judge Türmen is confused about the majority judgment, as it does not specifically state that Article 2 is abrogated. The majority judgment states that it "could," and "can," not that it "does" abrogate.⁷⁶

The *Öcalan* Chamber judgment was appealed to the Grand Chamber, and one of the arguments presented by counsel for the defence was that the Grand Chamber should state that the practice of the Member States had "abrogated" Article 2(1). The Grand Chamber stated that the applicant asked it to take "it a stage further by concluding that the States had, by their practice, abrogated the exception set out in the second sentence of Article 2(1)."⁷⁷ This confirms that the Chamber had not abrogated

⁷⁵ Trilsh and Rüth, above, fn. 66, p. 183.

⁷⁶ *ibid*, para 196.

⁷⁷ *Öcalan v. Turkey*, Application No. 46221/99, Grand Chamber Judgment, 12 May 2005, para 175.

Article 2(1). In effect, Öcalan was trying to persuade the Grand Chamber to adopt an “evolutive” interpretation of the *Convention*, and in effect create European policy.⁷⁸ But the Grand Chamber did not comply as it held, in comparing Article 2(1) with Article 3, “if Article 2 is to be read as permitting capital punishment, notwithstanding the almost universal abolition of the death penalty in Europe, Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2(1).”⁷⁹ This is a complicated judgment and displays the difficulty the Grand Chamber had in dealing with Article 2(1) in the presence of *Protocol No. 13*. As such, the Grand Chamber did not pronounce specifically on the issue itself, as it identified the current irreconcilability of the texts of Articles 2(1) and 3. It deferred the question to the practice of the Member States as it stated:

[t]he Court notes that by opening for signature Protocol No. 13 concerning the abolition of the death penalty in all circumstances the Contracting States have chosen the traditional method of amendment of the text of the Convention in pursuit of their policy of abolition.⁸⁰

However, it should also be seen that the Grand Chamber was playing an active role in restricting the scope of the punishment. Clare Ovey and Robin White observed that the Grand Chamber “speculated” on whether the Protocol ratifications could

⁷⁸ This would be in line with Paul Maloney’s views on the role of the Court and the reluctance of the use of judicial activism, see above, fn. 29.

⁷⁹ *Öcalan v. Turkey*, (GC), above, fn. 77, paras 162-3.

⁸⁰ *ibid*, para, 164.

signal a modification of Article 2(1), and found it unnecessary “to resolve the point because of its finding that it would be a breach of Article 2 to implement a death sentence after an unfair trial.”⁸¹ When the Grand Chamber could rely on a reduction of the scope of the punishment, it enabled it not to resolve the question of actual amendment. The Grand Chamber was holding back on formulating an evolutive human rights policy in order to wait for universal verification from the Member States through ratification of *Protocol No. 13*. Hence the Grand Chamber side-stepped the issue in its *dictum* and this abstinence brought a concurring opinion by Judge Garlicki. He stated:

[t]oday the Court, while agreeing that “it can be said that capital punishment in peacetime has come to be regarded as an unacceptable...form of punishment which is no longer permissible under Article 2,” seems to be convinced that there is no room for the death penalty even in the original text of the Convention. But, at the same time, it has chosen not to express that position in a universally binding manner. In my opinion, there are some arguments suggesting that the Court could and should have gone further in this case.⁸²

The judge then cited the Opinion of the Parliamentary Assembly and could not give, in his mind, “a good reason” why the Court did not follow the statement, as he held that the Court did have jurisdictional competence.⁸³ He stated, “[t]he only problem

⁸¹ Clary Ovey and Robin C.A. White, *Jacobs and White, The European Convention on Human Rights*, 4th ed, (Oxford: Oxford University Press, 2006), p. 62.

⁸² See, *Öcalan v. Turkey*, above, fn. 77, Partly Concurring, Partly Dissenting Opinion of Judge Garlicki, para 2.

⁸³ *ibid*, paras 3-7.

is: who shall have the power to declare, in a binding manner, that such modification has taken place? So this is a problem not of substance, but of jurisdiction (competence).”⁸⁴ However, if Judge Garlicki had considered Lidbom’s 1980 report and the subsequent Parliamentary Assembly recommendations to the Committee of Ministers, he would have been able to identify the Committee of Minister’s role. In effect, Judge Garlicki was asking, “where does the authority to amendment lie?” As he further stated:

I am not convinced by the majority’s replication of the *Soering* approach. I do not think that there are any legal obstacles to this Court’s taking a decision with respect to the nature of capital punishment.⁸⁵

It would have been useful if Judge Garlicki had engaged with the Lidbom report and perhaps distinguished the observation that the Committee of Ministers is the only Council organ which can amend the text of the *Convention*. Lidbom stated that the amendment authority lies with the Committee and the Grand Chamber followed this. It appears that amendment of Article 2(1) may need to follow a three pronged process: firstly, the Committee drafting of a Protocol, secondly, the Member State acceptance and ratification of this protocol; and thirdly, the Court pronounces a judgment based upon state ratification. If this is correct the European Court of Human Rights must adhere to the wording of the protocol. In this case, neither *Protocol No. 6* nor *Protocol No. 13* expressly amend Article 2(1). So it would

⁸⁴ *ibid*, para 3.

⁸⁵ *ibid*, para 5.

appear that the Grand Chamber did not have jurisdiction at this time. The majority were correct.

The European Court of Human Rights has considered cases post-*Öcalan* and has evolved its jurisprudence. Trilsh and Rüth argued that in *Öcalan* the “Court’s interpretation of Article 2 was...too narrow,”⁸⁶ and Peter Hodgkinson had predicted in 2000 that the “Court will probably be obliged to go beyond the principles laid down in the Soering judgment.”⁸⁷ However, post *Öcalan v. Turkey*, the Court has not reconsidered its decisions as to the complicated balancing of Article 2(1) and *Protocol No. 13*, with the right to life *per se*, because no other Member States has sought to directly impose the death penalty. But it has considered the application of the right to life in extradition circumstances where a suspect may be extradited by a Member State to a receiving state to face a capital charge.

In between the two *Öcalan* judgments, the Court considered *G.B. v. Bulgaria*,⁸⁸ where the applicant was convicted and sentenced to death in 1989. Then a moratorium was put in place and Bulgaria abolished the death penalty in 1998 and ratified Protocol No. 6 in 1999. No Article 2(1) violation was held, and this reasoning was followed in *Iorgov v. Bulgaria*.⁸⁹ In *Mamatkulov and Askarov v. Turkey*,⁹⁰ the court held unanimously that when in extradition circumstances the

⁸⁶ Trilsh and Rüth, above, fn. 66, p. 182.

⁸⁷ Hodgkinson, above, fn. 3, p. 630.

⁸⁸ *G.B. v. Bulgaria*, Application No. 42346/98, 11 March 2004.

⁸⁹ *Iorgov v. Bulgaria*, Application No. 40653/98, 11 March 2004.

⁹⁰ *Mamatkulov and Askarov v. Turkey* Applications nos. 46827/99 and 46951/99, 4 February 2005, where the assurances that the death penalty are sufficient, Article 2 is not violated. See also, *S.R. v.*

courts finds that if a death penalty would be applied then there is violation of Article 3 under *Soering*, and so it does not need to consider the case under Article 2(1).⁹¹ This was held in February 2005, and two months later in, *Shamayev and 12 others v. Georgia and Russia*,⁹² the Court confirmed that extradition would not expose the applicants to a real risk of extra-judicial execution, contrary to Article 2(1). But then in November 2005, the court modified its jurisprudence.

In *Bader and Others v. Sweden*,⁹³ the case concerned the deportation of a suspect to Syria with the possibility of facing a capital trial. The Court considered that “an issue may arise under [Article 2] of the Convention if a Contracting State deports an alien who has suffered or risks suffering a flagrant denial of a fair trial in the receiving state, the outcome of which was or is likely to be the death penalty.”⁹⁴ It found that “the deportation of the applicants to Syria, if implemented, would give rise to [a violation of Article 2].”⁹⁵ As such, the Court was extending its jurisprudence on the right to life and the death penalty, and it now declared that an execution does not have to take place to initiate an Article 2(1) violation. Only the potential of an execution is required. The determining factor in this case was the possibility of an arbitrary deprivation of life. Judge Cabral Barreto stated in his concurring opinion that this was the first time “the Court has plainly stated that the

Sweden, Application No. 62806/00, 23 April 2002; *Ismaili v. Germany*, Application No. 58128/00, 15 March 2001; *Bahaddar v. the Netherlands*, (145/1996/764/965) 19 February 1998, paras. 75-78.

⁹¹ *Mamatkulov and Askarov v. Turkey*, *ibid*, para 78.

⁹² *Shamayev and 12 others v. Georgia and Russia*, Application No. 36378/02, 12 April 2005

⁹³ *Bader and others v. Sweden*, Application No. 13284/04, 8 November 2005.

⁹⁴ *ibid*, para 42.

⁹⁵ *ibid*, para 48.

extradition or deportation of a person to a country where he or she risks an unfair trial followed by capital punishment will violate Article 2 of the Convention.”⁹⁶ So although the Court has extended the right to life, it was in the circumstances of an unfair trial. But these cases still have not amended the text of Article 2(1).

Finally, it is appropriate to mention the application by Saddam Hussein, to initiate the jurisdiction of the *Convention*. Saddam Hussein claimed that his arrest, detention, handover and trial violated *inter alia*, *Convention* Article 2 and Protocols No. 6 and No. 13.⁹⁷ Hussein argued that he would be executed, and that his case fell under the jurisdiction of the respondent states because of their occupation of Iraq. The Court held that it did not have jurisdiction to hear the case because the applicant had not demonstrated that the states “had jurisdiction on the basis of their control of the territory where the alleged violations took place,” and also that even “if he could have fallen within a State’s jurisdiction because of his detention by it, he has not shown that any one of the respondent States had any responsibility for, or any involvement or role in, his arrest and subsequent detention.”⁹⁸ As such the Court held that there was no jurisdictional link within the meaning of Article 1 of the *Convention*.⁹⁹ This reasoning can be placed with the hypocritical stances made by some of the governments of the Member States. A spokesman for Tony Blair stated:

⁹⁶ *ibid*, Concurring opinion of Judge Cabral Barreto.

⁹⁷ *Hussein v. Albania and Other States*, Application No. 23276/04, 14 March 2006.

⁹⁸ *ibid*.

⁹⁹ Article 1 states, “The High Contracting Parties shall secure to everyone within its jurisdiction the rights and freedoms defined in [the *Convention*.]” However, the House of Lords has suggest that the *Convention* may have extra-territorial effect in occupied Iraq following its decision in *Regina (Al-Skeini and others) v. Secretary of State for Defence (The Redress Trust and another intervening)*

we emphasised that if the executions were to be carried out then they should be done so in a dignified way. Now if, as appears to be the case, that didn't happen, that clearly was wrong.¹⁰⁰

The *International Herald Tribune* reported that, “the Czech Republic's right-wing prime minister, Mirek Topolanek, welcomed the Hussein sentence, calling it “an act of justice” and a warning to other dictators. President Lech Kaczynski of Poland called it “the only possible outcome.”¹⁰¹ An EU Commissioner echoed this ambivalence when he stated, “[t]he passing of Saddam Hussein closes a long, painful chapter in the history of Iraq. While the EU opposes capital punishment as a matter of principle, Saddam's trial and punishment mean that those who commit crimes against humanity cannot escape justice. His career and legacy show the futility of the politics of violence and terror.”¹⁰² However, in the Council of Europe, the statements were unanimous in their renunciation of the execution. René van der Linden, President of the Council of Europe Parliamentary Assembly stated, “today’s

[2005] EWCA Civ 1609. See for a discussion of this case see, Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (Abington: Routledge-Cavendish, 2008), pp. 74-76.

¹⁰⁰ In Quotes: Iraq Hangings Reaction, BBC News website, accessed, 3rd March 2008, http://news.bbc.co.uk/1/hi/world/middle_east/6264177.stm

¹⁰¹ International Herald Tribune, November 19, 2006, <http://www.ihl.com/articles/2006/11/19/europe/web.1119hangRIW.php>

¹⁰² Statement by Commissioner Ferrero-Waldner on the passing of Saddam Hussein. 30/12/2006, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/516&format=HTML&aged=0&language=EN&guiLanguage=en>.

sentence of the death penalty send a dangerous message to the region,”¹⁰³ and Terry Davis, Secretary General of the Council of Europe, stated that what “Iraqi people need is justice not retribution.”¹⁰⁴

What these statements reflect is that there is still deep ambivalence within Europe on the extent of the “right to life” and Article 2(1), and whether there are exceptional circumstances when the death penalty can be applied.

5.4 Conclusion

This chapter has engaged with the propositions for the amendment of Article 2(1) and the significance of *Protocols No. 6* and *Protocol No. 13* for this issue. It has been argued that firstly, there is an intrinsic friction between the Parliamentary Assembly and the Committee of Ministers and this dialogue has resulted in the Committee not specifically providing a Protocol for the textual change of Article 2(1). As a result, the majority of the Member States have hitherto provided their consent to remove the death penalty under the Protocols, but as there was no legal provision for the textual change, no state consent can be identified for specific amendment.

¹⁰³ ‘Pace President reacts to verdict on the trial of Saddam Hussein,’ Press Release, 666 (2006), Strasbourg, 5/11/2006.

¹⁰⁴ ‘Council of Europe Secretary General: Iraqi people need justice not retribution,’ Strasbourg 5/11/2006.

Furthermore, it should be noted as Judge De Meyer identified, a “development of legal conscience and practice” may have occurred, but that this conscience is not yet reflected in the *Convention*. This may be the case, but the European Court of Human Rights has not held it to be so, even with the interpretive tools provided to itself by the analysis of “present day conditions” and that the Convention is a “living instrument.” As such, Trilsh and R  th correctly identify that “[s]till absent...is a clear determination by the Court that the prohibition of capital punishment is an integral part of [the Convention].”¹⁰⁵

This reveals the ever-present questions surrounding the extent of the individual’s “right” to life as apposed to the state’s “right” to judicially kill as a penal sanction, and the scholarship on this question has evolved since the adoption of the *Convention* to the present time. After the adoption of the *Convention*, Robertson noted that Article 2(1) was “careful to protect the legality of capital punishment,”¹⁰⁶ and William Schabas has argued that Article 2(1) “seems woefully inadequate in terms of limiting the use of the death penalty.”¹⁰⁷ These statements reveal the possibility that remains unless the Article is amended.

It would appear that the origin of the right to impose the death penalty still rests with the Member States, but it is also true that if the Committee drafts another Protocol to amend Article 2, that the states can choose to ratify and make the legal

¹⁰⁵ Tilsh and Ruth, above, fn. 66, p. 186.

¹⁰⁶ A.H. Robertson, ‘The Contribution of the Council of Europe to the Development of International Law,’ 59 *Am. Soc’y Int’l L. Proc.* 201 (1965), p. 205.

¹⁰⁷ William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed, (Cambridge: Cambridge University Press, 2002), p. 266.

statement that it does not intend to apply the death penalty in any circumstances. As the states ratify the human rights provisions the discourse on the right to life will be strengthened.

We now consider in the next chapter how *Protocols No. 6* and *Protocol No. 13* have affected the Court's jurisprudence on the *Convention* Article 3 prohibition on inhuman punishment.

Chapter Six:
The Parameters of the Prohibition Against Inhuman Punishment

6. The Parameters of the Prohibition Against Inhuman Punishment

6.1 Introduction

The purpose of this chapter is to engage with the evolution of the interpretation of Article 3. Previously, Chapter Two outlined the acceptance of the death penalty at the drafting of the *Convention* and revealed that the punishment was not considered to be a violation of Article 3. The analysis which follows considers how this initial presumption may have been challenged by Council organs.

The specific questions to be addressed are: has the compatibility of Article 2(1) with Article 3 been resolved by the Parliamentary Assembly, and/or the Commission and Court? Is there unanimity within the Council organs on how to implement Article 3 for scrutiny of the death penalty? How has Article 3 been used to penetrate the Member States' right to impose the death penalty? What follows engages with these questions by first examining the Parliamentary Assembly's approach to Article 3.

Then the jurisprudence is outlined and the issue of the compatibility of Article 3 with Article 2(1) is considered. This is followed by a consideration of the "death row phenomenon" which encompasses an evaluation of the various aspects of the capital judicial system, and how it impacts upon the capital defendant and inmates. The Commission and Court decisions concerning the capital charge and trial, the commutation of death sentences to prison terms, the issues surrounding extradition

and deportation, death sentences under moratorium, death row conditions, and method of execution are considered.

In conclusion, it is observed that both the Parliamentary Assembly and the European Court of Human Rights have adopted a notion of legitimacy to assess the different aspects of the death penalty. This may be seen to create a new norm against the punishment, by specifically expanding the language of *Convention* human rights. It is investigated whether a new argument is being formulated which does not explicitly refer to the text of Article 3, but which represents the “spirit” of the prohibition against torture and inhuman punishment.

6.2 The Parliamentary Assembly Scrutiny of the Death Penalty Under Article 3

The *travaux préparatoires* do not indicate that in 1949-50 the drafting committees of the *Convention* considered that Article 3 affected the scope or general application of the death penalty. However, as revealed in the previous chapters, underlying humanistic and human rights arguments began to have an influence on the interpretation of the *Convention*.

In 1973, Astrid Bergegren’s *Motion* in the Parliamentary Assembly stated, “capital punishment must now be seen to be inhuman and degrading within the meaning of

Article 3 of the European Convention on Human Rights.”¹ Bergegren called on the Consultative Assembly to unify its position and initiate a new *Convention* human rights discourse and identify that the death penalty was an inhuman punishment.

As described in Chapter Four, the Motion was sent back to the Committee on Legal Affairs, who shelved it, and also Bertil Lidgard’s efforts were thwarted. It was not until 1980 when Carl Lidbom presented his report to the Committee and affirmed that “the debate on the death penalty ought...to be carried on” because the punishment “is being called into question...from the human rights standpoint.”² There is scholarly work from this period reflecting that the death penalty was not yet considered an Article 3 issue. Francis Jacobs argued in 1975 that “Article 3 should be considered as imposing an absolute prohibition on certain forms of punishment such as, perhaps, flogging, which are by their very nature inhuman and degrading.”³ Jacobs had recognised that Article 3 was intrinsic for scrutinising punishment practices in Member States, but he had not envisioned, or at least expressed, at this time that the reach of the prohibition grasped the death penalty.

For the history of the anti-death penalty movement in Europe, the 1977 Amnesty International conference in Stockholm is extremely significant as it mandated in its Declaration that the “death penalty is the ultimate cruel, inhuman and degrading

¹ *Motion for a Resolution on the abolition of the death penalty*, Assembly Doc. 3297, 1973, para 7. See also, Hans Göran Franck, *The Barbaric Punishment: Abolishing the Death Penalty*, (ed: William A. Schabas) (The Hague: Martinus Nijhoff, 2003), p. 62.

² Bertil Lidgard’s unpublished report was reprinted in the *Report on the abolition of capital punishment* Assembly Doc. 4509 (2nd and 3rd sittings) 22 April 1980.

³ Francis Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975), p. 31.

punishment.”⁴ Amnesty International were echoing Bergegren and Lidgard and called for a firm identification that the punishment is the “ultimate” violation of this human rights threshold, and this should be recognised internationally.⁵ Following this declaration Christian Broda, the Austrian Minister of Justice, invited the Committee of Ministers to consider the death penalty as an “inhuman” punishment.⁶ It should also be recalled that by the late 1970s Spain and Portugal had removed the punishment for peacetime offences, and only France within the Western European region was not considered a *de facto* abolitionist Member State. Hence, there was now an almost uniform Western European government rejection of the punishment.

This was a fertile political circumstance from which the Parliamentary Assembly was able to act. In 1980, as detailed in the previous chapter, it issued its strongest human rights platform through a Resolution, Recommendation and Report on this very issue.⁷ The report specifically engaged with the death penalty being inhuman.⁸ Carl

⁴ In fact in 1977 Amnesty International stated in the Preamble to the 1977 Stockholm Declaration that it, “Recalls that the death penalty is the ultimate cruel, inhuman and degrading punishment,” and so it would appear that it had decided this before 1977. See, Amnesty International, *Report on the Amnesty International Conference on the Death Penalty*, Stockholm, 10-11 December 1977, AI Index: CDP 02/01/78.

⁵ Since 1977, Amnesty International have become an international authority on the human rights mechanisms for the restriction and abolition of the death penalty. See, www.amnesty.org/deathpenalty

⁶ Christian Broda, ‘The Elimination of the Death Penalty in Europe,’ paper presented to the meeting of the European death penalty coordinators of Amnesty International, Stockholm, 30 March 1985, AI Index: EUR 01/01/85.

⁷ See, Report, above, fn. 2; Resolution 727 (1980) *on the abolition of capital punishment*, text adopted by the Assembly, (3rd sitting) 22 April 1980; Recommendation 891 (1980) *on the abolition of capital punishment*, text adopted by the Assembly, (3rd sitting) 22 April 1980.

Lidbom noted that capital punishment could also be regarded as “inhuman” within the meaning of Article 3 of the *Convention*,⁹ and the Parliamentary Assembly followed its 1980 Resolution when it considered “that capital punishment is inhuman.”¹⁰ The 1980 Report declared that the death penalty “is” a violation of Article 3, and emphasised the argument that, “[c]apital punishment certainly constitutes ‘inhuman and degrading treatment or punishment.’”¹¹

The Parliamentary Assembly was attempting to isolate and renounce the punishment and this strategy advanced a new interpretive technique for Article 3; from one where the Article is used to scrutinise the *application* of the punishment, to one which actually challenges the Member State right to the punishment. It first proposed an interpretation of the European Court of Human Rights decision in *Tyrer v. the United Kingdom*.¹² In *Tyrer* the Court held that corporal punishment of school children was inhuman and degrading, but the Report relied on this judgment to argue that the death penalty “is” contrary to Article 3.

⁸ Report, *ibid*, pp. 2-3; Renate Wohlwend, *The role of the Council of Europe's Parliamentary Assembly*, p. 66, in Council of Europe, *Death Penalty – Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

⁹ The report stated that the death penalty was “undoubtedly” contrary to Article 3 of the Convention, *ibid*, para 4, p. 14.

¹⁰ Resolution 727, above, fn. 7, p. 1.

¹¹ *ibid*, p. 13, para 25.

¹² *ibid*, p. 14, para 4, citing *Tyrer v. United Kingdom*, Application Nos. 5856/72; 5775/72, 14 December 1976.

William Schabas identified that this was a “rather bold”¹³ interpretation of *Tyrer*, and, this research would agree, as indeed, the Court’s subsequent majority decisions have not (yet) envisioned such interpretation.¹⁴ However, Manfred Nowak has argued that if human right experts, such as the Judges of the European Court of Human Rights, can hold that corporal punishment, as in *Tyrer* to be “inhuman,” then why can they “at the same time arrive at the conclusion that capital punishment is not inhuman?”¹⁵ Lidbom’s conclusion to his 1980 Report parallels Nowak’s argument when he stated:

[i]n my opinion, the Council of Europe must now state firmly and clearly that capital punishment should be abolished for the simple reason that it is inhuman and thus incompatible with our system of values.¹⁶

When he presented this report for debate, Lidbom reiterated the position that the Legal Affairs Committee proposed that the Council should now consider the

¹³ William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed, (Cambridge: Cambridge University Press, 2002), p. 283, fn. 129.

¹⁴ Subsequent cases have confirmed this interpretation, and they are considered below, including, *inter alia*, *Kirkwood v. the United Kingdom*, Application No. 10308/83, 12 March 1984; *Soering v. the United Kingdom*, Application No. 14038/88, 7 July 1989; and *Öcalan v. Turkey*, Application No. 46221/99, 12 March 2003 (Chamber); 12 May 2005 (Grand Chamber).

¹⁵ Manfred Nowak, ‘Is the Death Penalty an Inhuman Punishment?’ p. 42, in Theodore S. Orlin, Allan Rosas and Martin Scheinin, (eds) *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, (Åbo: Åbo Akademi University, 2000).

¹⁶ Report, above, fn. 2, p. 22 para 4.

punishment to be inhuman¹⁷ and he emphasised this by stating that this provided the “crucial argument.”¹⁸ Various other speakers supported this view.¹⁹ Even though Lidbom had not solved all of the technical issues relating to the death penalty, his arguments were symptomatic of the evolving sentiments within Council Member States.

The penological standards relating to the death penalty had dramatically evolved and the vast majority of Member States and Parliamentarians were more receptive to the anti-death penalty position. The seedlings of a new discourse against the death penalty had been planted, and as such, the Article 3 prohibition was now to be juxtaposed against Article 2(1). We now turn to consider the case-law of the European Commission of Human Rights and European Court of Human Rights, to analyse whether the judicial organs agreed with this juxtaposition.

6.3. The Jurisprudence of Article 3

6.3.1 The Compatibility of Article 3 and Article 2(1)

¹⁷ Parliamentary Assembly, Official Report of Debates, 32nd Ordinary Session, Abolition of capital punishment, Debate on the report of the Legal Affairs Committee, Doc, 4509 and amendments, (2nd and 3rd Sittings), 22 April 1980, p. 52.

¹⁸ *ibid*, Lidbom stated, “The crucial argument is the one contained in our draft resolution: that capital punishment is inhuman and thus incompatible with human rights,” p. 54.

¹⁹ See, *ibid*, Mr. Flanagan of Ireland, p. 56; Mr. Stoffelen of the Netherlands, pp. 60; Mr. Meier of Switzerland, p. 61; and Mrs Aasen of Norway, p. 67.

The Parliamentary Assembly's claims that the death penalty was to be considered inhuman, must be placed within a jurisprudential context. The judicial organs of the European Commission of Human Rights and the European Court of Human Rights, have engaged interpretive techniques to consider the difficult issue of how to reconcile Articles 2(1) and 3. The initial juridical question was to consider whether Article 3 *per se* rendered the death penalty a violation of the *Convention*; or to hold that Article 3 only applies to scrutinise each aspect of the capital judicial system. The former would be in line with the Assembly, but the later would curtail the promoted discourse.

In *Kirkwood v. the United Kingdom*,²⁰ the European Commission of Human Rights first considered this intricate question and held that:

one may see a certain disharmony between Articles 2 and 3 of the Convention. Whereas Article 3 prohibits all forms of inhuman and degrading treatment and punishment without qualification of any kind, the right to life is not protected in an absolute manner. Article 2(1) expressly envisages the possibility of imposing the death penalty.²¹

This Commission jurisprudence in 1985 conflicted with the Assembly's position from 1980, and it may be interpreted as reflecting an ambivalent element, or at least a point

²⁰ *Kirkwood v. the United Kingdom*, above, fn. 14, p. 184. Carl Lidbom has stated in the debates for the 1980 report that contrasting Articles 2(1) and 3 revealed a, "contradiction in the European Court of Human Rights," above, fn. 17, p. 53.

²¹ *ibid*, p. 190.

of disagreement, within the *Convention* organs. The Commission established a cardinal rule that the “right to life is not protected in an absolute manner,” and what this seems to mean in a practical sense is that there will be some (unspecified) circumstances where the death penalty was not considered to be an Article 3 violation. As such the Commission was demonstrating that there were pragmatic issues to this attempted new discourse which the Assembly had not adequately engaged with.

However, the Assembly were not alone in their determination to advance the argument that the death penalty should be seen as a *per se* violation of Article 3, as Amnesty International began to build on their 1977 Declaration and attempted to initiate their human rights arguments within the judicial fora. In *Soering v. the United Kingdom*, Amnesty International submitted an *amicus curiae* brief and argued that the evolving standards of interpretation meant that the death penalty should now be considered as a breach of Article 3.²²

Amnesty International argued in 1989, the year of the *Soering* judgment, that, “[n]o matter what reason a government gives for executing prisoners and what method of execution is used, the death penalty cannot be separated from the issue of human rights. The movement for abolition cannot be separated from the movement for

²² *Soering v. the United Kingdom*, above, fn. 14, para 8. The Court noted, “Amnesty International in their written comments argued that the evolving standards in Western Europe regarding the existence and use of the death penalty required that the death penalty should now be considered as an inhuman and degrading punishment within the meaning of Article 3,” para 101.

human rights.”²³ Also that, “The death penalty is not an act of self defence against an immediate threat to life. It is the premeditated killing of a prisoner who could be dealt with equally well with less harsh means.”²⁴

But the Court followed the Commission’s reasoning in *Kirkwood* and rejected the possibility of such evolutive interpretation which would have in effect made Article 2(1) inoperative.²⁵ The Court considered the coming into force of *Protocol No. 6* and Member State signature and ratification. It stated:

[s]ubsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the Contracting States to abrogate the exception provided for under article 2(1) and hence to remove a textual limit on the scope for evolutive interpretation of article 3. However, Protocol No. 6, as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as 1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an agreement. In these conditions, notwithstanding the special

²³ Amnesty International, *When the State Kills... The Death Penalty v. Human Rights*, (London: Amnesty International Publications, 1989), p. 1.

²⁴ *ibid*, p. 2.

²⁵ See, Alistair Mowbray, ‘The Creativity of the European Court of Human Rights,’ 5 *HRLR*, 57 (2005), pp. 66-68; Schabas, above, fn. 13, p. 271.

character of the Convention, article 3 cannot be interpreted as generally prohibiting the death penalty.²⁶

The Court's position was that Article 3 cannot "*per se*" be held to prohibit the death penalty.²⁷ The question that arises from this judgment is whether a "hierarchy of rights"²⁸ within the *Convention* was inferred. Clare Ovey and Robin White identify that the human rights guaranteed under the *Convention* can be generally divided into two categories: unqualified rights, some of which are non-derogable, and qualified rights which are derogable.²⁹ Generally speaking if an unqualified right comes into conflict with a qualified right, the unqualified right would take precedence. This is because the state may under certain circumstances interfere with qualified rights through derogation: for example in emergency situations which threaten the life of the nation under *Convention* Article 15.

However, the *Kirkwood* and *Soering* identification of the potential conflict between Articles 2(1) and 3 poses an intricate problem. Firstly, the two Articles provide unqualified, non-derogable rights within *Convention* Article 15, and under *Protocol*

²⁶ *Soering v. the United Kingdom*, above, fn. 14, paras 103-4.

²⁷ The Court here abstained from amending the human rights legislation itself and refrained from what could be interpreted as judicial activism. For scholarly work on this point see, Paul Mahoney, 'Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin,' 11 *H.R.L.J.* 57 (1990); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights*, (Oxford: Oxford University Press, 2008), pp. 80-98.

²⁸ See, Clare Ovey and Robin C.A. White, *Jacobs and White: The European Convention on Human Rights*, 4th ed, (Oxford: Oxford University Press, 2006) pp. 6-7.

²⁹ *ibid*, p. 7.

No. 6 no derogation of either is possible.³⁰ Secondly, the very nature of the applicability of Article 2(1) places a qualification on Article 3. This complex jurisprudential situation resulted in the Court giving prominence to Article 2(1) over Article 3. As such it will not be changed unless the text of either Article is amended, which would require a Protocol by the Committee of Ministers and ratification of such a Protocol by the Member States. The *Soering* decision can be seen as one which accepted the traditional role of the state in amending the *Convention*, and it did not want to make the decision to apply evolutionary interpretation to, in effect, judicially amend the *Convention* text. William Schabas observed that the Court “felt that to the extent articles 2(1) and 3 were in contradiction, this was a matter for the States parties to resolve by amendment to the Convention and not something to be tackled by the judiciary.”³¹

By 2004, all Member States except Russia had signed and ratified *Protocol No. 6* and *Protocol No. 13* had opened for signature and ratification. The Member States began to sign and ratify this new protocol and form a consensus that the death penalty is abolished in all circumstances. This shift in collective penal policy was considered by

³⁰ *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty*, Article 4, “No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.” The same provision was included in *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in all circumstances*, Article 2, “No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.”

³¹ William A. Schabas, *The Death Penalty as Cruel Treatment and Torture: Capital Punishment in the World's Courts*, (Boston: Northeastern University Press, 1996), p. 9.

the European Court of Human Rights in *Öcalan v. Turkey*.³² The Chamber of the Court first outlined the general interpretive principles on Article 3 consistent with the *Soering* decision.³³ The textual limit provided by the harmonising of Articles 2(1) and 3 prevented the *Öcalan* Court from adopting an “evolutive interpretation,”³⁴ as this would nullify the wording of a *Convention* Article. The “intention of the States” was held to prevent the Court from taking an activist approach.³⁵ Although the Court was adhering to internal state jurisdiction, it noted that since 1950 the penal policy of Member States had evolved,³⁶ and since *Soering*, through the ratifications of *Protocol No. 6* and *Protocol No. 13*, Member States have independently chosen not to impose the death penalty and restrict it, and remove it from their most current statutes. So the Chamber went on to further explain:

[i]n the Court’s view, it cannot now be excluded, in the light of the developments that have taken place in this area, that the States have agreed through their practice to modify the second sentence of Article 2 (1) in so far as it permits capital punishment in peacetime. Against this background it can also be argued that the implementation of the death penalty can be regarded as inhuman and degrading treatment contrary to Article 3. However it is not necessary for the Court to reach any firm conclusion on this point since for the following reasons it would run counter to the Convention, even if Article 2 were

³² *Öcalan v. Turkey* [C] Application No. 46221/99, 12 March 2003.

³³ *ibid*, p. 50 para 189, citing *Soering*, para 103.

³⁴ *ibid*, p. 50, para 191, citing *Soering*, paras 103-4.

³⁵ See, Mowbray, above, fn. 25, pp. 61-72.

³⁶ *Öcalan v. Turkey*, above, fn. 32, p. 51, para 194.

to be construed as still permitting the death penalty, to implement a death sentence following an unfair trial.³⁷

This part of the judgment establishes an interpretive mechanism detailing how Article 3 can be utilised to question the very right of the Member State to impose the death penalty. The Court noted that “[s]tates have agreed to modify the second sentence of Article 2(1) in so far as it permits capital punishment in peacetime.” So Article 3 can be interpreted as prohibiting the death penalty in peacetime.

Although not explicitly stated, but it appears to be the case with the presence of *Protocol No. 6*, that in peacetime Article 2(1) cannot now apply. It appears that the recognised “certain circumstances”³⁸ where the death penalty may be applied in Europe are limited to wartime, as William Schabas has argued that the *Öcalan* Court “clearly rules that the death penalty in peacetime is contrary to article 3, and thus it is not sheltered by article 2(1).”³⁹ The Partially Dissenting Opinion of Judge Türmen supports this argument as he held, “Article 2 still permits [the] death penalty in wartime. The logical conclusion would then be that the death penalty constitutes a breach of Article 3 in peacetime but not in wartime (because it is permitted in Article 2).”⁴⁰

³⁷ *ibid*, p. 52, para 198.

³⁸ *ibid*, p. 52, para 199.

³⁹ William A. Schabas, ‘International Law, Politics, Diplomacy and the Abolition of the Death Penalty,’ 13 *Wm. & Mary Bill Rts. J.* 417 (2004), p. 428.

⁴⁰ *Öcalan v. Turkey*, above, fn. 32, Partly Dissenting Opinion of Judge Türmen, p. 71. It should also be argued that although Article 3 cannot be interpreted to *per se* prohibit the death penalty in wartime, it can be used to ensure that the death penalty is not applied in an inhuman way in wartime.

The refusal of the Chamber to hold that Article 3 now provides an absolute ban on the death penalty was challenged by Öcalan on appeal to the Grand Chamber of the European Court of Human Rights. The applicant submitted the argument that a penological evolution had taken place since the drafting of the *Convention* in 1950, and this change in Member State policy meant that Article 3 should now be interpreted as explicitly renouncing the death penalty. It was also argued there had been *de facto* abolition throughout Europe, and that no interpretation of Article 2(1) should allow a Member State to inflict inhuman and degrading treatment since the death penalty *per se* constituted such treatment.⁴¹ Here Öcalan was utilising the same arguments as Amnesty International and the Parliamentary Assembly detailed above. However, the Grand Chamber affirmed that Article 3 cannot be interpreted as providing a *per se* ban on the death penalty. This is a holding which has not changed since *Kirkwood* in 1985.⁴²

The Grand Chamber also agreed with the conclusions of the Chamber on the compatibility of Articles 2(1) and 3 after the opening for signature of *Protocol No. 13*,⁴³ and followed the *Soering* “traditional method of amendment” analysis “in pursuit of their [the Member States] policy of abolition.”⁴⁴ The Court in *Soering* gave prominence to the Member State signatures and ratifications of *Protocol No. 6*, and

⁴¹ *Öcalan v. Turkey*, Application No. 46221/99 [GC] 12 May 2005, paras 157-158.

⁴² *ibid*, para 162, stated, “[i]n practice, if Article 2 is to be read as permitting capital punishment, notwithstanding the almost universal abolition of the death penalty in Europe, Article 3 cannot be interpreted as prohibiting the death penalty since that would nullify the clear wording of Article 2.”

⁴³ *Öcalan v. Turkey*, above, fn. 32, paras 189-196.

⁴⁴ *Öcalan v. Turkey*, above, fn. 41, para 164.

refused to initiate judicial amendment. Following the adoption of *Protocol No. 13*, the Grand Chamber in *Öcalan*, also refused to apply an evolutionary interpretation. The Grand Chamber was not prepared to reinterpret Article 3, but, significantly, it allowed the Member States to guide this penological issue. It further affirmed:

[f]or the time being, the fact that there are still a large number of States who have yet to sign or ratify Protocol No. 13 may prevent the Court from finding that it is the established practice of the Contracting States to regard the implementation of the death penalty as inhuman and degrading treatment contrary to Article 3 of the Convention.⁴⁵

Although the Parliamentary Assembly and the Committee of Ministers was advancing a human rights discourse for the restriction and abolition of the death penalty, and the Member States were signalling agreement through signature and ratifications. In 2005 the Grand Chamber did not want to pre-empt any possible unanimous Member State position. It recognised that the restriction of the death penalty is an intricate question concerning the exercise of sovereignty and wanted to allow the states to restrict their practices through their own sovereign choices.

However, Judge Garlicki provided a different argument: one which did not consider the sovereign question to be paramount. He supported the evolving human rights discourse that Article 3 had been violated because “any imposition of the death penalty represents *per se* inhuman and degrading treatment prohibited by the

⁴⁵ *ibid*, paras 164-165.

Convention.”⁴⁶ He agreed with the majority’s conclusion that a death sentence following an unfair trial is a violation of Article 3, but the restriction placed on the decision seemed to the Judge to “stop short of addressing the real problem.” He stated:

I am writing this separate opinion because I feel that, in this case, the Court should have decided, in the operative provisions of its judgment, that Article 3 had been violated because any imposition of the death penalty represents *per se* inhuman and degrading treatment prohibited by the Convention. Thus, while correct, the majority’s conclusion that the imposition of the death penalty following an unfair trial represents a violation of Article 3 seems to me to stop short of addressing the real problem.

It is true that the majority’s conclusion was sufficient to establish a violation in the instant case and that it was not absolutely necessary to produce any firm conclusion on the – more general – point whether the implementation of the death penalty should now be regarded as inhuman and degrading treatment contrary to Article 3 in all circumstances. I accept that there are many virtues of judicial restraint, but am not persuaded that this was the best occasion to exercise it.⁴⁷

However, to explain his judgement, Judge Garlicki does not engage with Article 3 but Article 2(1). He does not reveal specifically why the death penalty is *per se* inhuman,

⁴⁶ *ibid*, Partly Concurring, Partly Dissenting opinion of Judge Garlicki.

⁴⁷ *ibid*, paras 1-2.

and does not explain why judicial restraint was not necessary in this case. As such he did not engage with the root issue of what he attempted to establish, and refused to provide any explanation as to how Article 3 would be applied to prohibit Article 2(1).

In contrast, the Jointly Partly Dissenting Opinion of Judges Costa, Caflisch, Türmen and Borrego Borrego, held that Article 3 does *not* provide a *per se* prohibition, and that in Öcalan's case, they argue, "there is no ground to believe that there was a real and immediate risk that the applicant would be executed," and that, "there is no violation of Article 3 on account of the death sentence."⁴⁸ These polarised opinions reveal the inherent conflict regarding the death penalty to be a *per se* violation of Article 3.

Even though there is now a majority of Member States have now signed and ratified *Protocol No. 13*, the subsequent cases of the European Court of Human Rights concerning the death penalty have not held that Article 3 now provides a *per se* prohibition against the death penalty, or that Article 2(1) is amended. These are considered below. It appears that the Court is waiting for what Renate Wohlwend warned would need to happen, in the "inelegant position" of another Protocol to amend officially Article 2(1) and remove the possibility of the death penalty from the text of the *Convention*.⁴⁹

⁴⁸ See, *Öcalan v. Turkey*, above, fn. 41, Joint Partly Dissenting Opinion of Judges Costa, Caflisch, Türmen and Borrego Borrego.

⁴⁹ *Explanatory Memorandum*, by Mrs. Renate Wohlwend, *rapporteur*, point, 1, in *Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances*, Doc. 9316, 15 January, 2002.

The next jurisprudential issue to consider is how Article 3 can be used to scrutinize the different aspects of the capital judicial system. This will involve a wider analysis of how Article 3 interpretation has evolved.

6.4 Article 3 Restriction of the Capital Judicial System

The European Commission and Court of Human Rights has interpreted Article 3 to engage with contemporary human rights and criminological investigations into the effects of the capital judicial system. The case-law on the death penalty has demonstrated the prominent role of Article 3 and the jurisprudence has evolved as the governmental penological views have changed.⁵⁰

⁵⁰ In *Poltoratskiy v. Ukraine*, Application No. 38812/97, 29 April 2003 the Court stated that, Article 3 enshrines one of the “most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman and degrading treatment or punishment, irrespective of the circumstances and the victim’s behaviour” at para 30. In *Denmark, Norway, Sweden and the Netherlands v. Greece*, the Sub-Committee of the European Commission of Human Rights held that “inhuman treatment covers at least such treatment as deliberately causes severe suffering, physical or mental, which in the particular situation is unjustified,” Application No. 3321/67; 3322/67; 3323/67 and 3324/67, 5 November 1994. For a general outline of the state’s positive duty not to impose inhuman treatment on individuals, see Stephanie Palmer, ‘A wrong turning: Article 3 ECHR and proportionality,’ *Cam.L.J.* 2006, 65 (2), 438-451.

Antonio Cassese has noted that the European Commission and European Court of Human Rights has “gradually enlarged the areas to which Article 3 should apply.”⁵¹ Malcolm Evans and Rod Morgan observe that “ideas of what amounts to severe or intense suffering will change over time,” and that “as with the thresholds between the elements of Article 3, the range of factors are not limited to the severity of suffering but can also embrace more policy-oriented factors.”⁵² William Schabas has confirmed, “[t]he concept of what is...inhuman, or degrading ought to change over time to reflect contemporary thinking and values.”⁵³

Although Article 3 applied to the death penalty as a human rights analysis, it also represented a restriction of the right of the sovereign Member State to impose the punishment. This is because the scope of the sovereign right to the punishment is being question and restricted.⁵⁴ The European Court of Human Rights has evolved its Article 3 analysis of the capital judicial system to cover; (a) the capital charge and trial process, (b) the circumstances when a death sentence is commuted to life imprisonment, (c) extradition and deportation cases, (d) moratoriums and the consequences of the suspension of executions, (e) the physiological and

⁵¹ Antonio Cassese, ‘Prohibition of Torture and Inhuman or Degrading Treatment or Punishment,’ p. 228, in R. St. J. McDonald et al, (eds), *The European System for the Protection of Human Rights*, (Netherlands: Kluwer Academic Publishers, 1993).

⁵² Malcolm D. Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, (Oxford: Clarendon Press, 1998), p. 93.

⁵³ Schabas, above, fn. 39, p. 426.

⁵⁴ See, Roger Hood, *The Death Penalty: A Worldwide Perspective*, 3rd ed, (Oxford: Oxford University Press, 2002), pp. 75, 113.

psychological impact of incarceration conditions, (f) the different methods of execution, and (g) the death row phenomenon as a jurisprudential consideration of these factors collectively. These specific issues are considered separately below.

6.5 The Capital Charge and Trial Process

The European Court of Human Rights' jurisprudence is inconclusive on whether a capital charge is a violation of Article 3. In *Talan v. Turkey*⁵⁵ the applicant argued that the criminal proceedings before sentence in his death penalty trial amounted to a violation of Article 3. But the Court held, "that the mere fact that the applicant could have been sentenced to the death penalty and that he lived with this fear is in itself not enough to amount to a violation within the meaning of Article 3 of the Convention."⁵⁶ Specific evidence was supplied by the applicant that he feared for his life, but this evidence was held not to be enough to attract an Article 3 violation.

A contrasting decision was reached in *Öcalan v. Turkey* even though the applicant had not given evidence that he feared the death sentence, the Court stated, "to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish."⁵⁷

⁵⁵ *Talan v. Turkey*, Application no. 31096/02, 30 March 2006.

⁵⁶ *ibid*, para 3.

⁵⁷ *Öcalan v. Turkey*, above, fn. 32, para 207.

In coming to this conclusion the Chamber joined the *Convention* Article 6 fair trial standards,⁵⁸ with the imposition of inhuman treatment or punishment under Article 3.⁵⁹ As such the Chamber held that a death sentence following an unfair trial would amount to an Article 3 violation.

The Chamber then identified by an objective test that an applicant would most likely suffer from “fear and anguish” while being tried for a capital offence, and such “anguish cannot be dissociated from the unfairness of the proceedings.”⁶⁰ It is appropriate to question this objective analysis and consider what would be the Chamber’s opinion if it found that the applicant had received a fair trial, as appeared to be the case in *Talan v. Turkey*. If a person is sentenced to death the “uncertainty as to the future” may be present both following a fair or unfair trial.⁶¹ In *Soering* it was held that the imposition of a fair trial did not alleviate the effects of the “death row phenomenon,” but the *Öcalan* Chamber did not consider this *Soering* position.⁶² Hence, the perceived unfairness of a capital trial makes a death sentence more certain, because the knowledge of a denial of due process would more likely lead to a death

⁵⁸ *ibid*, paras 111 and 169.

⁵⁹ Stephano Manacorda, ‘Restraints on Death Penalty in Europe: A Circular Process,’ *JICJ*, 1 (2003), 263-283, p. 281.

⁶⁰ *Öcalan v. Turkey*, above, fn. 32, para 169.

⁶¹ Whilst working on capital cases at the Oklahoma Indigent Defense System and the Federal Public Defender’s Office, Oklahoma City, between 1996 and 1997, we had some clients who had received effective assistance, and some which had not. It appeared irrelevant to the anxiety which they felt concerning their approaching executions.

⁶² The *Soering* Court accepted that the provisions in the Virginia Code “undoubtedly serve...to prevent the arbitrary or capricious imposition of the death penalty...They do not however remove the...death row phenomenon for a given individual once condemned to death,” above, fn. 14, para 109.

sentence: not an uncertainty of one. Judge Türmen took issue with the *Öcalan* majority in a Partly Dissenting Opinion, when he stated:

the judgment is confined to the death penalty following an unfair trial, that is to say a combination of Articles 6 and 3 of the Convention...It must be underscored at the outset that the applicant has not made a complaint to the Strasbourg Court to this effect...the applicant in his written or oral submissions never claimed under Article 3 that he felt fear and anguish due to the unfairness of the criminal proceedings which resulted in a violation of Article 3, that is to say a complaint that combines Articles 3 and 6...Inhuman treatment within the meaning of Article 3 is based on a subjective concept, that is to say fear and anguish felt by the applicant that reaches the threshold level required by Article 3. In the absence of such a complaint, it is not possible for the Court to stand in the applicant's shoes and decide *ex officio* that there has been a violation of Article 3 in reliance on the assumption that the applicant must have felt such fear and anguish.⁶³

⁶³ *Öcalan v. Turkey*, above, fn. 32 Partly Dissenting Opinion of Judge Türmen, and he further reminded the majority of Chamber of the basic principles of Article 3 analysis, “[f]or a threat to constitute an inhuman treatment there must be a “real risk.” A mere possibility is not in itself sufficient. The threat should be “sufficiently real and immediate.” It must be shown that the risk is real,” citing, *Vilvarajah v. the United Kingdom*, Application Nos. 13163/87; 13164/87; 13165/87; 1344/87 and 13448/87, 30 October 1991; *Campbell and Cosans v. the United Kingdom*, Application Nos. 7511/76 and 7743/76, 25 February 1982; and *H.L.R. v. France*, (11/1996/630/813) 29 April 1997.

Judge Türmen confirmed the absence of the subjective component of the Court's Article 3 assessment.⁶⁴ However, in later cases the Court has not followed Judge Türmen's reasoning. The Court has appeared to affirm its objective test for fear of future punishment under Article 3, as it adopted this analytical reasoning in *Bader and others v. Sweden*.⁶⁵ This case concerned the deportation of the applicant from Sweden to possibly face a capital trial in Syria. The Court reiterated the objective analysis when it declared:

because of the summary nature and the total disregard of the rights of the defence, the proceedings must be regarded as a flagrant denial of a fair trial. Naturally, this must give rise to a significant degree of added uncertainty and distress for the applicants as to the outcome of any retrial in Syria. In the light of the above, the Court considers that the death sentence imposed on the first application following an unfair trial would inevitably cause the applicants fear and anguish as to their future if they were forced to return to Syria as there exists a real possibility that the sentence will be enforced in that country.⁶⁶

Not only does the *Bader* decision follow in *Öcalan* that the death sentence "must have" caused a violation of the applicant's human rights, but also the problematical

⁶⁴ Judge Türmen further took issue with the majority on whether the applicant's death sentence was more real than in *Cinar v. Turkey* Application No. 17864/91, 5 September 1994, and he argued, "I cannot accept the majority's opinion that in the present case the risk of execution for the applicant was more real than in *Çinar*," *ibid* and this is discussed in more detail below.

⁶⁵ *Bader and Others v. Sweden*, Application No. 13284/04, 8 February 2006.

⁶⁶ *ibid*, para 47; citing, *Mamatkulov and Askarov v. Turkey* Application Nos. 46827/99 and 46951/99, 4 February 2005.

argument that unfair trials cause “uncertainty” of future punishment is repeated. It would appear more appropriate for the Court’s *dictum* to demonstrate through subjective evidence supplied by the applicant, whether the unfairness of the proceedings were understood and whether such understanding produced a detrimental cognitive impact. Such decisions by the European Court of Human Rights are clearly favourable for the applicant and the Court is using its jurisprudence to restrict the Member States’ and receiving Third States’ capital judicial systems. Whilst this is very welcome for anti-death penalty jurisprudence, the Court still needs to be careful not to undermine the authority, quality and legitimacy of its Article 3 jurisprudence.

In the initiation of a possible “fair” capital trial, it would appear to depend on a subjective analysis of whether the applicant had fear and anguish resulting from the death sentence, as was held in *Soering*. But if the applicant did not fear his sentence, would the sentence independent of an adverse cognitive impact on the applicant be a violation of Article 3? If it was found, through psychological examination that no “fear” was present, then would his mental health be called into question? It is presumed that this would be the argument for the applicant. Following Article 2(1), a death sentence would *prima facie* not be a violation in these circumstances, but other aspects of the capital judicial system, such as incarceration conditions or a severe prison regime,⁶⁷ may be held to be a violation of Article 3.

⁶⁷ See *Poltoratskiy v. Ukraine*, Application No. 38812/97, 29 April 2003; *Kuznetsov v. Ukraine*, Application no. 39042/97, 29 April 2003; *Nazarenko v. Ukraine*, Application no. 39483/98, 29 April 2003; *Dankevich v. Ukraine*, Application no. 40679/98, 29 April 2003; *Aliiev v. Ukraine*, Application no. 41220/98, 29 April 2003; *Khokhlich v. Ukraine*, Application no. 41707/98, 29 April 2003.

6.6 The Death Sentence Commuted to Life Imprisonment

The intricate issue of the commutation of the death sentence and determining appropriate alternative punishments has been considered by the Court in a number of cases. In *Kotalla v. the Netherlands*, the applicant was sentenced to death in 1948 for war crimes, but had his death sentence commuted to life imprisonment.⁶⁸ The Commission held “the sentence of life imprisonment replaced a death sentence, and as capital punishment is permitted by the Convention, it cannot hold that life imprisonment replacing it is itself a breach of Article 3.”⁶⁹

However, in *Ilaşcu and others v. Russia and Moldova*⁷⁰ the Court provided a modified reasoning and held that the applicant had suffered inhuman treatment under a sentence of death, even though his sentence was commuted: the commutation did not alleviate the previous inhuman treatment it merely discontinued its effect. In *Öcalan v. Turkey*, the applicant was also held to have suffered an Article 3 violation before his death sentence was commuted.⁷¹

⁶⁸ *Kotalla v. The Netherlands*, Application No. 7994/77, 6 May 1978.

⁶⁹ *ibid*, p. 241. See also, *Lehideux and Isorni v. France*, (55/1997/839/1045) 23 September 1998; Resolution DH (99) 713 Concerning the judgment of the European Court of Human Rights, of 23 September 1998 in the case of Lehideux and Isorni against France, *Adopted by the Committee of Ministers on 3 December 1999 at the 688th meeting of the Ministers' Deputies*.

⁷⁰ *Ilaşcu and others v. Russia and Moldova*, Application No. 48787/99, 8 July 2004.

⁷¹ *Öcalan v. Turkey*, above, fn. 41, para. 165.

In another aspect of this issue in *Maksimov v. Azerbaijan*⁷² the applicant claimed that the commutation of the death penalty to life imprisonment was to his detriment, as when he was sentenced to death the maximum alternative sentence was fifteen years imprisonment. The Court held that the amendment of the law between death sentence and commutation did not change the fact that he received a lesser sentence.⁷³ The Court affirmed that a commutation of a death penalty to life imprisonment was not a violation of Article 3 or the prohibition of the imposition of a heavier sentence under Article 7 in *Kafkaris v. Cyprus*,⁷⁴ but it may be that the court is prepared to re-evaluate this jurisprudence as this decision was a narrow hold via a majority of ten votes to seven.⁷⁵

⁷² *Maksimov v. Azerbaijan*, Application No. 38228/05, 1 February 2007.

⁷³ In this case the applicant relied on the *Convention* Article 7 prohibition of heavier sentences, but the Court gave an intricate holding stating that the new law had been adopted in Azerbaijan before the *Convention* was adopted, and as a result the *Convention* could not have retroactive effect, see, *Hummatov v. Azerbaijan*, Application Nos. 9852/03 and 13413/04, 8 May 2006.

⁷⁴ *Kafkaris v. Cyprus*, Application No. 21906/04, 12 February 2008. The Court stated in para 97, “[t]he imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention” (see, *inter alia*, among many authorities, *Kotälla v. the Netherlands*, Application No. 7994/77, 6 May 1978; *Bamber v. the United Kingdom*, Application No. 13183/87, 14 December 1988; and, *Sawoniuk v. the United Kingdom*, Application No. 63716/00, 29 May 2001). At the same time, however, the Court has also held that the imposition of an irreducible life sentence may raise an issue under Article 3 (see, *inter alia*, *Nivette v. France* Application No. 44190/98, 3 July 2001; *Einhorn v. France*, Application No. 71555/01, 16 October 2001; *Stanford v. the United Kingdom*, Application No. 73299/01, 12 December 2002; and *Wynne v. the United Kingdom*, Application No. 67385/01, 22 May 2003).

⁷⁵ *ibid*, see Joint Partly Dissenting Opinion of Judges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann and Jebens; Partly Dissenting Opinion by Judge Loucaides joined by Judge Jöcienė.

The variations in the judgments is identified by a technical jurisprudential difference between an Article 3 analysis of a *prima facie* weighing of the impact of a death sentence with life imprisonment, and on a further analysis of the effect of the death sentence on the individual before the sentence was commuted. What can be observed from these cases is an evolved jurisprudence from one where Article 2(1) provided the negation of scrutiny following a death sentence, to an enhanced Article 3 position for scrutinising the effect of the death sentence upon the applicant before the punishment was commuted.

Furthermore, even though the Court has held that a life sentence is a viable alternative following commutation, this may be questioned in future cases.⁷⁶ As the sovereign right of the death penalty is being restricted and renounced, so too the ability to determine a life sentence as an alternative, may no longer be an unfettered penological option.

6.7 Extradition and Deportation

When a criminal suspect flees from the country where the crime was claimed to have been committed, transfer proceedings may be initiated between the requesting and

⁷⁶ See, *Abbas Sertkaya v. Turkey*, Application No. 77113/01, 11 December 2003; see also, *Partington v. the United Kingdom*, Application No. 58853/00, 26 June 2003; *Léger v. France*, Application no. 19324/02, 11 April 2006. This case was submitted to the Grand Chamber. See also, Rachael Stokes, 'A Fate Worse than Death? The Problems with Life Imprisonment as an Alternative to the Death Penalty,' in Jon Yorke (ed) *Against the Death Penalty: International Initiatives and Implications*, (Dartmouth: Ashgate, 2008).

requested state. If there is a bilateral treaty between the states, a procedure of request and consent will be regulated by the provisions included within the treaty. As such this is a mutual exchange which will be negotiated by the states. Furthermore, the states may be parties to a multilateral treaty, and the provisions within that treaty will also govern the transfer proceedings. Where no treaty exists, municipal and international law will be used to adjudicate on the proceedings adopted by the states.⁷⁷ Within the *Convention* system of human rights, the *Convention*, the multilateral *European Convention on Extradition* and its *Protocols*,⁷⁸ and bilateral treaties,⁷⁹ govern the extradition proceedings from Member States⁸⁰ to receiving states, and within the transfer proceedings of suspects facing capital charges, there

⁷⁷ In his scholarly work on public international law, Ian Brownlie has argued that the circumstances surrounding the legality of extradition procedures will depend on “questions of internal and particularly constitutional law and the effect of treaties on municipal rules,” *Principles of Public International law*, 6th ed, (Oxford: Oxford University Press, 2003), p. 313.

⁷⁸ *European Convention on Extradition*, CETS No. 024, 13 December 1957; *Additional Protocol to the European Convention on Extradition*, CETS No. 086, Strasbourg, 15 October 1975; *Second Additional Protocol to the European Convention on Extradition*, CETS No. 098, Strasbourg, 17 March 1978. See, Theodore Konstadinides, ‘The Perils of the ‘Europeanisation of Extradition Procedures in the EU: Mutuality, Fundamental Rights and Constitutional Guarantees,’ 14 *M.J.E.C.L.* 2 (2007) 379-400, p. 380. The European Union have harmonised the extradition procedures within its Member States through the European Arrest Warrant, see, *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States*, (2002/584/JHA), OJ, L/190/1 18.7.2002.

⁷⁹ See for example, *Extradition Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America*, (1977) 1049 UNTS 167.

⁸⁰ For a review of municipal cases which have not been considered by the European Commission on Human Rights and the European Court of Human Rights see, Schabas, above, fn. 13, p. 26; Jon Yorke, ‘Europe’s judicial inquiry in extradition cases: closing the door on the death penalty,’ *E.L. Rev.* 2004, 29(4), 546-556.

has been an evolution in the juridical scrutiny. What follows below is an evolution of the weak provisions within the *Convention on Extradition*, Article 11, as outlined in Chapter Four, to the establishing of a firm human rights principle against extradition individuals to face the death penalty.

An early case in 1963 demonstrated that extraditions may have occurred even though there was the possibility of torture or inhuman treatment or punishment being imposed by the receiving state.⁸¹ However, in the 1970s the Commission began to accept that extradition circumstances may lead to a violation of the *Convention*.⁸² Ivan Shearer had noted in 1971 that extradition treaty provisions which included some kind of a prohibition against the death penalty were becoming more common.⁸³

However, in *Amekrane v. the United Kingdom*,⁸⁴ the British government circumvented the judicial inquiry when extraditing Amekrane to Morocco to face a

⁸¹ See, *X. v. the Federal Republic of Germany*, Application No. 1802/62, 26 March 1963, p. 462, where the Commission held that in a now defunct reasoning that in exceptional circumstances, “due to the very nature of the regime of that country or to a particular situation in that country, basic human rights such as are guaranteed by the Convention might be either grossly violated or entirely suppressed,” p. 480. This decision was upheld in *X v. Switzerland*, Application No. 9012/80, 9 December 1980, p. 205.

⁸² See *Kerkoub v. Belgium*, Application No. 5012/71 40 Collected Decisions 55 (1972); *Altun v. Federal Republic of Germany*, Application No. 10308/83, 3 May 1983.

⁸³ I.A. Shearer, *Extradition in International Law*, (Manchester: Manchester University Press, 1971), p. 149. For the general development of death penalty clauses in extradition treaties, see, J.S. Reeves, ‘Extradition Treaties and the Death Penalty, 18 *A.J.I.L.* 2, 298-300 (1924); William A. Schabas, ‘Indirect Abolition: Capital Punishment’s Role in Extradition Law and Practice,’ 25 *Loy. L. A. Int’l & Comp. L. Rev.* 581 (2003).

⁸⁴ *Amakrane v. the United Kingdom*, Application No. 5961/72, 19 July 1974.

capital trial. He was executed and following negotiations a “friendly settlement” was agreed and the government paid compensation to Amekrane’s widow.⁸⁵ This friendly settlement was affirmed by the Commission. Although this case did not create a jurisprudential renunciation of the United Kingdom’s transfer procedure it is an example of both the state government’s admission that it had acted illegitimately, and also the Commissions acceptance of this fact.

The specific jurisprudence on the transfer of suspects to face a capital trial outside the Council Member State’s borders was considered in *Kirkwood v. the United Kingdom*.⁸⁶ In this case Kirkwood was to be extradited to California to face a capital trial, and the United Kingdom government had extradited him before adequate judicial enquiry, through the appeals process, had been completed. The United Kingdom was neither a party to the *Convention on Extradition* nor *Protocol No. 6*, and Nigel Price argued that these two instruments provided a “European context” against the death penalty at the time.⁸⁷ Price pointed out that no adequate European review could have been given because, “by the time of the admissibility question came before the Commission, Kirkwood’s extradition had already been effected.”⁸⁸

⁸⁵ The United Kingdom government and Mohamed Amakrane’s widow reached a settlement and she received £35,000. See, *ibid*, p. 4.

⁸⁶ *Kirkwood v. United Kingdom*, above, fn. 14.

⁸⁷ Nigel S. Price, ‘Human Rights, “Death Row,” and Administrative Law Remedies,’ 34 *I.C.L.Q.* 1, (1985), 162-167, p. 163. As discussed in Chapter Three, the *European Convention on Extradition*, Article 11 prohibition on the extradition of suspects to face capital charges.

⁸⁸ *ibid*, p. 164. The United Kingdom had extradited Kirkwood, and as with the case of Amakrane, the government had not allowed for full judicial inquiry into the extradition circumstances.

Both *Amekrane* and *Kirkwood* demonstrate that the United Kingdom was attempting to protect its monopoly to decide extradition circumstances without recourse to any *Convention* standards. However, later cases demonstrate that the United Kingdom was brought within the scrutiny of the Commission and Court.

In *Soering v. the United Kingdom*,⁸⁹ the Court considered the extradition of Jens Soering to face a capital trial in Virginia, United States. The Court was of the opinion that there was a real prospect he would be sentenced to death and await execution on death row for six to eight years and that the mental anguish he would suffer would be a violation of Article 3.⁹⁰

Several factors contributed to the Court's decision to hold that extradition would cause Soering "inhuman and degrading treatment." The Court considered it significant that he was only eighteen at the time of the crime, that he suffered from the mental condition "folie à deux," that the conditions on death row enhanced by the prolonged detention would contribute to his suffering, and finally, that Germany had requested that as a German citizen, Soering be extradited to its jurisdiction to stand trial.⁹¹

The United Kingdom had not signed or ratified *Protocol No. 6* at this time nor had it become a Party to the *European Convention on Extradition*. However, there was a

⁸⁹ *Soering*; see also, Richard B. Lillich, 'The Soering Case,' (1991) 85 *A.J.I.L.* 128; Ann Sherlock, 'Extradition, Death Row and the Convention,' (1990) *E.L. Rev.* 15 () 87; Susan Marks, 'Yes, Virginia, Extradition May Breach the European Convention on Human Rights,' (1990) 49 *Cam. L.J.* 194.

⁹⁰ *ibid*, para 106.

⁹¹ *ibid*, para 111.

bilateral extradition treaty between the governments of the United Kingdom and the United States.⁹² Article 4 of the treaty allowed for either government to refuse extradition of a suspect unless there were “assurances satisfactory” that the death penalty would not be imposed. During extradition negotiations between the two governments, Virginia modified the assurance and the state prosecutor indicated that he would seek the death penalty, but would submit to the jury the wishes against the administration of the punishment by the United Kingdom government.

Under such circumstances the Court held that there were substantial grounds for believing that the applicant would be sentenced to death.⁹³ This assurance did not meet the treaty requirement, and it was held to violate *Convention* Article 3.⁹⁴ Judge De Meyer stated in his Concurring Opinion that extradition would only be lawful, “if the United States were to give absolute assurances that he would not be put to death.”⁹⁵ The assurance was only an undertaking of representation to the Virginian capital jury, and not an absolute assurance against a capital trial.⁹⁶

⁹² *Extradition Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America*, (1977) 1049 UNTS 167, Article 4 states: If the offence for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out. This Extradition Treaty was referred to by the *Soering* above, fn. 14, at para 36.

⁹³ *ibid*, para 98.

⁹⁴ John Andrews and Ann Sherlock, argued that the *Soering* decision “has great significance in the area of the potential conflict of treaty obligations,” in ‘Council of Europe: European Court of Human Rights: Extradition, Death Row and the Convention (Country Survey)’, *E.L.Rev.* 15, 87, 1990, p. 92.

⁹⁵ See *ibid*, Concurring Opinion of Judge De Meyer.

As a consequence of this decision the Commission, Court and Member States⁹⁷ could utilise extradition proceedings to restrict and prohibit the death penalty in a specific case in receiving states outside of the Council sphere. It had become a mechanism to challenge directly the sovereign right of the punishment. Richard Lillich noted that the *Soering* decision was the “pebble thrown in the pond” and the ripples would be felt internationally.⁹⁸ The scope of the *Convention* to restrict Member States from sending suspects to face a capital trial in receiving states had been widened. This would also have implications for the sovereign monopoly to determine the application of the capital judicial system.

A conflict has arisen between a sovereign ideology which refuses to impose the death penalty, and one which continues to try to do so. It implicates the Member States as “states parties are now responsible for breaches of Article 3 that are the foreseeable consequence of extradition.”⁹⁹

Furthermore, there is scope here to argue that the principle of “non-refoulement” is being violated. This principle is developing into a human rights position to prohibit

⁹⁶ *Soering v. the United Kingdom*, Resolution DH (90) 8.

⁹⁷ There are recorded cases of Member State’s courts applying the Convention to prevent the extradition of suspects to face capital trials in receiving states. See, *Short v. the Kingdom of the Netherlands* (1990) translated in 29 I.L.M. 1378; *Venezia v. Ministero di Grazia e Giustizia*, (1996) 79 Rivista di Diritto Internazionale 815.

⁹⁸ Richard B. Lillich, ‘Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study,’ 40 *St. Louis U. L.J.* 699 (1996), p. 704.

⁹⁹ Marks, above, fn. 89, p. 196.

the transfer of an individual from a Member State to a receiving state where there is a risk of ill-treatment under Article 3.¹⁰⁰ As the European Court of Human Rights considers whether there are “substantial grounds have been shown for believing that the person concerned [if extradited or deported] faces a real risk of being subjected to treatment contrary to Article 3,”¹⁰¹ this principle may now be seen to incorporate capital extradition and deportation cases.

William Schabas has observed that the Council and its Member States “exports its philosophy by refusing extradition to states on other continents where capital punishment still exists,”¹⁰² and Roger Hood and Carolyn Hoyle have considered this as an example of what they term as the development of an ideology of “non-cooperation.”¹⁰³ What is significant is that the states themselves are turning their backs on the possibility of the death penalty in specific cases, and signing bilateral extradition treaty procedures which restrict the capital judicial process, and also through the multilateral fora by the *Convention on Extradition*. What this displays is that the human rights discourse is creating a norm that in extradition circumstances

¹⁰⁰ This argument had been utilised in the case of Mohammed Ramzy in *Ramzy v. the Netherlands*, Application No. 25424/05, and submitted to the European Court of Human Rights in the *Written Comments by Amnesty International, the Association for the Prevention of Torture, Human Rights Watch, Interights, the International Commission of Jurists, Open Society Justice Initiative and Redress*, 22 November 2005. The case of *Ramzy v. the Netherlands*, is currently before a Chamber of the Third Section of the European Court of Human Rights.

¹⁰¹ *Saadi v. Italy*, Application No. 37201/06, 28 February, 2008. See also, *Vilvarajah and Others v. the United Kingdom*, above, fn. 63, para 103; and *H.L.R. v. France*, above, fn. 63, para. 34.

¹⁰² Schabas, above, fn. 13, p. 221.

¹⁰³ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 4th ed, (Oxford: Oxford University Press, 2008), p. 24.

the receiving state's capital judicial system will be circumvented. We had seen that previously it was the other way around, with the British government circumventing the appeals process to allow extradition and executions were implemented.

In *Chahal v. the United Kingdom*, the UK government argued that issues of national security could be taken into consideration when it decided whether or not to extradite the applicant. The Court held that there was no "room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged."¹⁰⁴ It further stated that "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration," and so national security considerations, "could not be invoked to override the interests of the individual where substantive grounds had been shown for believing that he would be subject to ill-treatment if expelled."¹⁰⁵

Colin Warbrick has also argued that the "[s]tate is not permitted to put considerations of security above the requirement that it comply with Article 3."¹⁰⁶ Here we see that Article 3 is evolving not only as a human rights principle to challenge the receiving state's capital judicial system, but it is being used to limit the circumstances under

¹⁰⁴ *Chahal v. the United Kingdom*, (70/1995/576/662), 15 November 1996, para 81. In *Klass and Others v. Germany*, Application No. 5029/71, 6 September 1978, the Court held that "the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate," at, para 49.

¹⁰⁵ *ibid*, paras 80 and 78. This judgment was confirmed in *Ahmed v. Austria*, Application No. 25964/94, 17 December 1996, para 41.

¹⁰⁶ Colin Warbrick, 'The European Convention on Human Rights and the Prevention of Terrorism,' 32 *I.C.L.Q.* 1, (1983), 82-119, p. 106.

which states can extradite individuals. Following the ruling in *Saadi v. Italy*, this principle still appears to be observed.¹⁰⁷ The Commission has also accepted the judgment of the Portuguese Constitutional Court when it held that it was unconstitutional to extradite a person to face capital charges in China for drugs trafficking.¹⁰⁸

Furthermore, in *Shamayev and others v. Georgia and Russia*, the Court held that there was a violation of Article 3 when a group of Chechens were extradited by Georgia to Russia.¹⁰⁹ The Chechen applicants claimed that the extradition (and some others were awaiting extradition) violated Articles 2(1) and 3 because of the risk of the death penalty in Russia. The Court noted that the Russian government had implemented “gradual elimination of the death penalty,”¹¹⁰ through the moratorium in the country, but it held that there was still a “real and personal risk of inhuman or degrading treatment within the meaning of Article 3.”¹¹¹

¹⁰⁷ *Saadi v. Italy*, above, fn. 101, para 125. The case of *Ramzy v. the Netherlands*, will also consider this question.

¹⁰⁸ See, *Lei Ch'an Wa v. Portugal*, Application No. 25410/94, unreported, 27 November 1995; *Yenng Yuk Leung v. Portugal*, Application No. 24464/94, unreported, 27 November 1995, cited in Schabas, above, fn. 13, p. 277, fn 95.

¹⁰⁹ *Shamayev and others v. Georgia and Russia*, Application No. 36378/02, 12 April 2005. Georgia acceded to the European Convention on Extradition on 13 September 2001, and Russia on 9 March 2000, and so the death penalty provision under Article 11 applied.

¹¹⁰ *ibid*, para 330.

¹¹¹ *ibid*, para 353; see also paras 368 and 386. It appears that this decision was an attempt to encourage Russia to ratify Protocol No. 6, and this issue is discussed in Chapter Seven. This analysis would also apply to deportation proceedings. See, *Bader and Others v. Sweden*, Application No. 13284/04, 8

However, extradition is *prima facie* permitted where the receiving state demonstrates that it will not impose the death penalty. In *Aylor-Davis v. France*, the European Commission on Human Rights considered the extradition proceedings of Joy Aylor-Davis who was charged with a capital offence in Texas.¹¹² The Dallas County prosecutor guaranteed that he would not pursue the death penalty and the Commission held that the *Convention* would not be violated under the circumstances. In *Nivette v. France* the Commission held that if assurances are sufficient then there is no violation of Article 3¹¹³ and in *Einhorn v. France*, which concerned the infamous Ira Einhorn saga and extradition to the United States a similar decision was reached.¹¹⁴

Furthermore, in *Mamatkulov and Askarov v. Turkey*,¹¹⁵ the Uzbekistan authorities gave assurances that it would not impose the death penalty if the suspect was extradited and this was held to not violate Article 3. In *Ismaili v. Germany*, the Moroccan government had declared to Germany that the offence the suspect was

February 2006. In 1991, and Richard Lillich had argued that the Soering principles could be applied to deportation proceedings, see, Richard B. Lillich, 'The Soering Case,' 85 *A.J.I. L.* 128 (1991), p. 142.

¹¹² *Aylor-Davis v. France*, Application No. 22742/93, 20 January 1994, removed from European Court of Human Rights website, cited in Schabas, above, fn. 83, pp. 589-590.

¹¹³ *Nivette v. France*, above, fn. 74.

¹¹⁴ *Einhorn v. France*, above, fn. 74. For a scholarly article on the Ira Einhorn saga, see Rachel K. David, 'Ira Einhorn's Trial in Absentia: French Law Judging United States Law,' 22 *N.Y.L. Sch. J. Int'l & Comp. L.* 611 (2003); Matthew Henning, 'Note: Extradition Controversies: How Enthusiastic Prosecutors Can Lead to International Incidents,' 22 *B.C. Int'l & Comp. L. Rev.* 247 (1999).

¹¹⁵ *Mamatkulov and Askarov v. Turkey*, Application Nos. 46827/99 and 46951/99, 4 February 2005, see para 62.

charged with did not carry a death sentence. So the specific claim that a possible death penalty would be imposed in violate Article 3 was nullified.¹¹⁶

Following the 11 September 2001 attacks on the United States, the Committee of Ministers adopted the Guidelines on human rights and the fight against terrorism.¹¹⁷

These Guidelines were intended to endorse the “top political priority” of not only contributing to the fight against terrorism, but also to ensure that the state does “not use indiscriminate measures which would only undermine...fundamental values.”¹¹⁸

Concerning the punishment of terrorists, Chapter X (2) states that the death penalty is prohibited for terrorist offences,¹¹⁹ and Chapter XIII (2) specifically details extradition procedures and the prohibition of the death penalty. It states:

¹¹⁶ *Ismaili v. Germany*, Application No. 58128/00, 15 March 2001. The European Commission of Human Rights made similar judgments in cases where capital punishment would not be imposed in the receiving state. See, *H. v. Sweden*, Application No. 22408/93, 5 September 1994, (no risk of capital punishment for avoiding military service).

¹¹⁷ *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, adopted by the Committee of Ministers, 11 July 2002, at the 804th meeting of the Minister’s Deputies. Also, the *Council of Europe Convention on the Prevention of Terrorism*, ETS No. 196, Warsaw, 16 May 2005, Articles 17-19 outline the extradition procedure for terrorist suspects. Article 11 details that the punishment of terrorists must comply with domestic law. As the Member States have abolished the death penalty, this would rule out recourse to the punishment in terrorist cases. See also *Explanatory Report*, Article 11 – Sanctions and measures, para 142.

¹¹⁸ *ibid*, Preface, p. 5, by Walter Schwimmer, Secretary General, Council of Europe.

¹¹⁹ Article X (2) “Under no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such sentencing being imposed, it may not be carried out.”

2. The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

- (i) the person whose extradition has been requested will not be sentenced to death; or
- (ii) in the event of such a sentence being imposed, it will not be carried out.

The provision for a possible death sentence within Chapters X (2) and XIII (2) appears to give political flexibility to states which have implemented a moratorium on executions, or have *de facto* abolished the death penalty. However, both Chapters X (2) and XIII (2) (ii) may open the door for possible death row phenomenon claims as in terrorist cases where mass homicide has occurred, public sentiment may be high for an execution, and moratoriums are not necessarily a guarantee for a ceasing of executions. Oscillation between moratorium, administration of execution, and reintroduction of moratorium is always a danger.¹²⁰ It is perhaps in compromise with those countries which have capital judicial systems that the possibility of a death sentence was included.

However, this provision would appear to be incompatible with the Court's separate opinions and indeed, *Soering* itself. Following *Talan v. Turkey*, it would appear that a capital trial may not be a violation of the *Convention*, but if the death penalty is not allowed, it seems an oddity to allow a capital trial to ensue. The conflict of the

¹²⁰ For example in the case of the reintroduction of executions in the Ukraine which is discussed in the next chapter.

sovereign state's right to formulate a capital judicial system and the scrutiny of the human rights discourse, appears to be evident here. It would appear that if these guidelines were applied to the transfer proceedings of Öcalan from Kenya to Turkey, they would not have provided a legal basis to prevent his death sentence.

6.8 Moratorium of Executions

What is noticeable from the case-law of the European Court of Human Rights is that when moratoriums have been initiated, and in *some* cases, violated, the Court has displayed judicial deference towards the governments. It is predominantly held that under moratoriums Article 3 is not violated. This can be seen as giving room and discretion for the municipal governments to guide the legislation process towards abolition by not holding them to be in violation of the *Convention* for keeping an inmate on death row until the legal status of the death penalty is determined.

When the Ukraine joined the Council of Europe in 1995 a moratorium on executions was initiated, however between 9 November 1995 and 11 March 1997, 212 people were executed. Following this violation of the moratorium in the case of *Poltoraskiy v. Ukraine*,¹²¹ and other Ukrainian cases decided on the same day,¹²² the European Court of Human Rights noted that the applicants were under sentence of death before

¹²¹ *Poltoraskiy v. Ukraine*, above, fn. 50.

¹²² See, *Kuznetsov v. Ukraine*, above, fn. 67, para 115; *Nazarenko v. Ukraine*, above, fn. 67, para 129; *Dankevich v. Ukraine*, above, fn. 67, para 126; *Aliiev v. Ukraine*, above, fn. 67, para 134; *Khokhlich v. Ukraine*, above, fn. 67, para 167.

the moratorium came into force and it cited the Parliamentary Assembly Reports in 1996, 1997, and Recommendation in 1999, recording the Ukrainian government's violation of the moratorium.¹²³ But the Court held that:

the applicant was sentenced to death in December 1995, some fifteen months before the moratorium came into effect. The Court accepts that, until the formal abolition of the death penalty and the commutation of his sentence, the applicant must have been in a state of some uncertainty, fear and anxiety as to his future. However, it considers that the risk that the sentence would be carried out, and the accompanying feelings of fear and anxiety on the part of those sentenced to death, must have diminished as time went on and as the *de facto* moratorium continued in force.¹²⁴

It is difficult to reconcile the breach of the moratorium with the possible diminishing of the psychological effect on the applicant's death sentence and incarceration on death row. The Court applied an objective test to the case and did not specifically

¹²³ See, Resolution 1097 (1996) *of the Parliamentary Assembly on the abolition of the death penalty in Europe*, text adopted by the Assembly on 28 June 1996 (24th sitting); Resolution 1112 (1997) *on the honouring of the commitment entered into by Ukraine upon accession to the Council of Europe to put into place a moratorium on executions*, text adopted by the Assembly on 29 January 1997 (5th sitting); and Resolution 1179 (1999) *honouring of obligations and commitments by Ukraine*, text adopted by the Assembly on 27 January 1999 (5th sitting); and Recommendation 1395 (1999) *on the honouring of obligations and commitments by Ukraine*, text adopted by the Assembly on 27 January 1999 (5th sitting). These Resolutions and Recommendation were cited in *Poltoraskiy v. Ukraine*, above, fn. 50, paras 106-108. See also, *Honouring of Obligations and Commitments by Ukraine*, Parliamentary Assembly Doc. 8272, 2 December 1998.

¹²⁴ *Poltoraskiy v. Ukraine*, above fn. 50, para 135.

consider the subjective cognitive impact on those sentenced to death. The decision that the moratorium “must have” diminished the applicant’s fear and anguish was applied to all of the Ukrainian applications,¹²⁵ and the consequence of this judgment and its affirmation in the other Ukrainian cases, is that the government was given judicial leniency when it attempted to remove the death penalty from its statute books through the political process of moratorium, and then official constitutional amendment.

This reasoning was followed in two Bulgarian cases, *Iorgov v. Bulgaria*, and *G.B. v. Bulgaria*,¹²⁶ where the Parliamentary Assembly argued that there were high crime rates and political instability which could challenge the moratorium.¹²⁷ In a 1998 Report the Parliamentary Assembly stated:

the context of an exceptional increase in crime and a situation highly conducive to crime, has sparked a broad public debate on the need for repeal of the moratorium. The debate has featured numerous contradictory arguments revealing that the state institutions do not agree on a single unified position on the matter.¹²⁸

¹²⁵ See, *Kusnetsov v. Ukraine*, above, fn. 67, para 115; *Nazarenko v. Ukraine*, above, fn. 67, para 129; *Dankevich v. Ukraine*, above, fn 67, para 126, *Aliev v. Ukraine*, above, fn. 67, para 134; *Khokhlich v. Ukraine*, above, fn. 67, para 167.

¹²⁶ *Iorgov v. Bulgaria*, Application no. 40653/98, 11 March 2004; *G.B. v. Bulgaria*, Application no. 42346/98, 11 March 2004.

¹²⁷ *Honouring of Obligations and Commitments by Bulgaria*, Doc. 8180, 2 September 1998.

¹²⁸ *Iorgov v. Bulgaria*, above, fn. 126, para 128.

Furthermore, a psychologist's report concluded that the applicant feared for his life during the moratorium, which would appear to satisfy a subjective diagnosis enabling the judicial determination that the applicant was treated in an inhuman way. However the Court held, following the same objective reasoning it adopted in the Ukrainian cases, that in the presence of the moratorium the inmate's fear must have diminished over time.¹²⁹

This decision clearly favours the Bulgarian government over the applicant, which appears to be because judicial deference was given to the political circumstances. Even considering the evidence of the Parliamentary Assembly Report, and the psychologist's diagnosis, the Court did not give any reasons or a reliance on any evidence as to why the applicant's fear and anxiety would diminish. However, Judge Tulkens gave a Concurring Opinion in both cases noting that the Court, in its Article 3 analysis, did not include the "fact that for many years he suffered uncertainty as to whether the death penalty to which he had been sentenced would be carried out."¹³⁰ She stated:

I feel that the Court should have taken into account the length of the period in issue and the ever-present risk of the death penalty being carried out. Firstly, while a moratorium on executions was an indispensable, and probably the only possible, first step in the political process leading to the abolition of the death penalty, the applicant's sufferings must have been exacerbated by the very fact that no change in his legal position as a person sentenced to death occurred for

¹²⁹ *G.B. v. Bulgaria*, above, fn. 126, para 76.

¹³⁰ *Iorgov v. Bulgaria*, and *G.B. v. Bulgaria*, Concurring Opinion of Judge Tulkens.

more than eight years. It took that long, including more than six years after the Convention's entry into force in respect of Bulgaria, for the Bulgarian legislature to abolish the death penalty. Secondly, the moratorium had been introduced by means of a mere decision by Parliament which could have been amended at any stage. That eventuality was by no means hypothetical, as is clear from the political debate on the death penalty in Bulgaria until its abolition in 1998...Lastly, as to the consideration that not a single violation of the moratorium on executions occurred in Bulgaria during these eight years, that fact could only be observed with hindsight and was therefore not capable of reducing the risk of the applicant's feelings of fear throughout that lengthy period.¹³¹

This Concurring Opinion is perhaps the most thorough analysis of the effectiveness and legitimacy of moratoriums by any Judge on the Court. Judge Tulkens found fault with the general acceptance, displayed in the majority decision, of the Court's jurisprudence on the solidity of the political suspension of the death penalty. She identified that moratoriums can only be determined "with hindsight" and are never to be substituted for constitutional amendment.

As moratoriums extend in time there may be underlying political circumstances within a country which could reinstate the death penalty. Such time spent under a moratorium should *prima facie* be distinguished from time spent under sentence of death when moratoriums are not in place, and subjective psychological diagnosis should be made to determine the extent of any possible violation of Article 3. Judge

¹³¹ *ibid.*

Tulkens in *Iorgov v. Bulgaria* and *G.B. v. Bulgaria*, was clearly not comfortable with a person under sentence of death for eight years under a moratorium, but the majority have not identified what moratorium duration would exceed the threshold of Article 3. As such there is currently no specific guidance as to how long a moratorium would have to be to attract an Article 3 violation.

Turkey has not executed anyone since 1984. In 1995 the Turkish government stated that its policy was not towards abolition, but to reducing the offences carrying the death penalty.¹³² Between 1994 and 2000 there were at least 100 people sentenced to death.¹³³ Mehmet Gemalmaz has argued that the Turkish legislative activity primarily concerned defunct capital statutes, and that “the true political will of the legislation organ in Turkey aims at retention of the death penalty and its regular and intensive application.”¹³⁴ In 1994 the European Commission of Human Rights considered Turkey’s moratorium in *Çinar v. Turkey* and observed that the moratorium had been applied consistently and that the threat of the execution of the applicant was “illusory.”¹³⁵ By the time of the *Çinar* decision the Turkish moratorium had been in

¹³² Hood, above, fn. 54, p. 27.

¹³³ *ibid*, p. 148.

¹³⁴ Mehmet Gemalmaz, ‘The Death Penalty in Turkey (1920-2001): Facts, Truths and Illusions,’ (2002) 13 *Criminal Law Forum* 91, p. 100. For a contrasting view see, *Z.Y. v. Germany*, where the European Commission on Human Rights stated that “in legal writing in Turkey the opinion prevails that the death penalty should be abolished,” Application No. 16846/90, Admissibility Decision, 13 July 1990.

¹³⁵ *Çinar v. Turkey*, Application no. 17864/91, 5 September 1994, page 9, para 5; Patrick Hudson, ‘Does the Death Row Phenomenon Violate a Prisoner’s Human Rights under International Law?’ *E.I.L.J.* (2000) vo. 11, No. 4, 833, p. 843.

place for ten years and the European Commission of Human Rights considered that to be a “long-standing moratorium.”¹³⁶

However, a dramatic shift in the jurisprudence was witnessed in *Öcalan v. Turkey*¹³⁷ when the moratorium had been in place for 19 years. The Chamber considered that Abdullah Öcalan’s case was distinguished from *Çinar* because of the specific political circumstances. Öcalan was the founder and political leader of the Kurdistan Worker’s Party and his Kurdish militia had “sustained violence causing many thousands of casualties, [which] had made him Turkey’s most wanted person.”¹³⁸ As a result, even with a moratorium which had lasted until 2003, the Chamber held, “surrounding the question of whether he should be executed, it cannot be open to doubt that the risk that the sentence would be implemented was a real one.”¹³⁹ The applicant was held to face a real risk of an execution during his three years under sentence of death, until the moratorium was concluded with an official abolition of the death penalty by the Constitutional Court of Turkey on 27th December 2002. On appeal the Grand Chamber confirmed the Chamber’s decision and stated that Öcalan’s case was a “special circumstance,”¹⁴⁰ which did challenge the political mechanisms enforcing the moratorium on the death penalty.

What the political and legal circumstances surrounding moratorium cases demonstrate is that the Court considers the death penalty ultimately to still be a

¹³⁶ *ibid*, para 5.

¹³⁷ *Öcalan v. Turkey*, above, fn. 32.

¹³⁸ *Öcalan v. Turkey*, above, fn. 32, para 210.

¹³⁹ *ibid*.

¹⁴⁰ *Öcalan v. Turkey*, above, fn. 41, para 172.

sovereign state question. That is unless the possibility of the reintroduction of the punishment becomes a real one and then the human rights threshold of Article 3 is activated to trump the sovereign Member State internal jurisdiction to dictate its capital judicial system. It is significant “who” the capital criminal is, and whether their crimes can be argued to threaten the stability of the state in some way. The final measure of the state action was whether Öcalan’s instigated violence had threatened the very life of the nation and it may be argued that he fundamentally challenged the stability of the country.

Furthermore, the *Öcalan* reasoning and the detailed Concurring Opinion by Judge Tulkens in the Bulgarian cases, should be encompassed to formulate an Article 3 analysis which states that even in moratoria circumstances which are considered to be solid, the possibility will always remain that firstly, the death penalty can return, and secondly, it is a subjective question as to whether applicants are not aware of the intricate political processes. Hence there will always be a possibility that the inmate will suffer from subjective inhuman treatment. However, the final measure will be more to do with who the applicant is.

6.9 The European Committee Against Torture and the Evaluation of Death Row Conditions

To evaluate the conditions on various death row prisons the European Court of Human Rights has considered numerous reports and investigations carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading

Treatment or Punishment (hereinafter, the “CPT”).¹⁴¹ Under the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Article 1, the task of the CPT is to “examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.”¹⁴²

Jim Murdoch, an expert on the CPT, has described the Committee as a “central player” and that the CPT is advancing human rights through an “on-going dialogue” with the governments of Member States.¹⁴³ Murdoch notes that as human rights lawyers become more aware of the work of the CPT, its impact will be enhanced through the jurisprudence that will be developed utilising the CPT’s reports.¹⁴⁴ The

¹⁴¹ See, generally the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, www.cpt.coe.int

¹⁴² *European Convention for the Prevention of Torture or Degrading Treatment or Punishment*, ETS, No. 126, Article 1. Text amended according to the provisions of the *Protocol No. 1 to the European Convention for the Prevention of Torture or Degrading Treatment or Punishment*, CETS No. 151 Strasbourg, 4 November 1993; and *Protocol No. 2 European Convention for the Prevention of Torture or Degrading Treatment or Punishment*, CETS No. 152, Strasbourg, 4 November, 1993 which entered into force on 1 March 2002.

¹⁴³ Jim Murdoch, ‘The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: activities in 1996 and 1997,’ *E.L. Rev.* 1998, 23 Supp (Human rights survey), 199-210, p. 199-200.

¹⁴⁴ *ibid*, p. 210; Jim Murdoch emphasised that the “essential prerequisites for CPT success is awareness of its work,” in ‘The Committee for the Prevention of Torture and Inhuman and Degrading Treatment: 1998 survey,’ *E.L. Rev.* 1999, 24 Supp (Human rights survey), 204-215, p. 204.

CPT has also developed its own “corpus of standards”¹⁴⁵ and the standards expressed within the reports are of “potential relevance in applications to Strasbourg both in helping establish the factual circumstances of detention and also in encouraging revision of existing Article 3 case law.”¹⁴⁶

The CPT is only concerned with fact finding investigations,¹⁴⁷ and it takes Article 3 as a “source of guidance” for its investigations.¹⁴⁸ The Directorate General of Human Rights has noted that the role of the CPT is to “visit any place where persons are being deprived of their liberty to ensure that all such persons are kept in human conditions.”¹⁴⁹

Murdoch’s opinion of the potential impact of the CPT appeared prophetic as the European Court of Human Rights heavily relied upon the CPT’s reports in the 2003 Ukrainian death row cases. The CPT’s Report to the Ukrainian government in 1998 stated:

¹⁴⁵ Jim Murdoch, The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment: activities in 2001,’ *E.L. Rev.* 2002, 27 Supp (Human rights survey 2002), 47-62, p. 55.

¹⁴⁶ *ibid*, p. 59.

¹⁴⁷ See, Antonio Cassese, ‘A New Approach to Human Rights: The European Convention for the Prevention of Torture, 83 *A.J.I.L.* 128 (1989), p. 136.

¹⁴⁸ *ibid*, p. 139.

¹⁴⁹ Council of Europe, *Death is not justice: the Council of Europe and the death penalty*, (Strasbourg: Directorate General of Human Rights, 2007), p. 23-24.

[p]risoners sentenced to death were locked up for 24 hours a day in cells which offered only a very restricted amount of living space and had no access to natural light and sometimes very meagre artificial lighting, with virtually no activities to occupy their time and very little opportunity for human contact. Most of them were kept in such deleterious conditions for considerable periods of time (ranging from 10 months to over two years). Such a situation may be fully consistent with the legal provisions currently in force in Ukraine concerning the treatment of prisoners sentenced to death. *However, this does not alter the fact that, in the CPT's opinion, it amounts to inhuman and degrading treatment.*¹⁵⁰ (emphasis added)

It is significant that although the CPT identified that the death row conditions may have complied with the then existent Ukrainian law, this did not prevent the CPT from declaring that the conditions amounted to inhuman and degrading treatment. This finding of fact was then translated into *Convention* jurisprudence by the Court to hold that the death row prison conditions in the Ukraine were a specific violation of Article 3.¹⁵¹

¹⁵⁰ *Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)* from 8 to 24 February 1998. The debates in the *travaux préparatoires* would have provided guidance through Mr. Cocks, a United Kingdom representative, who stated that individuals should “not be subjected to imprisonment with such an excess of light, darkness, noise or silence as to cause mental suffering,” *TP*, 2, p. 4.

¹⁵¹ See, *Poltoratskiy v. Ukraine*, above, fn. 50, para 109-117; *Kuznetsov v. Ukraine*, above, fn. 67, para 89-96; *Nazarenko v. Ukraine*, above, fn. 67, para 94-102; *Dankievich v. Ukraine*, above, fn. 67, para 94-102; *Aliiev v. Ukraine*, above, fn. 67, para 92-100; *Khokhlich v. Ukraine*, above, fn. 67, para 133-141.

Since *Soering*, not only has the jurisprudence evolved on death row conditions, but the CPT reports have contributed to this evolution. What is now considered are the personal circumstances of the applicant including the age, sex, mental and physical health both before and during incarceration on death row.¹⁵² The material conditions of the prison are also scrutinised with emphasis placed on access to natural light, fresh air and adequate living conditions.¹⁵³ The prison regime is evaluated with an expectation of access to medical care, sufficient outdoor exercise and a reasonable quality of food,¹⁵⁴ and the length of detention on death row is assessed but no decisions have been made as to what length of detention on death row reaches the threshold of Article 3. In addition the Court held that poor economic circumstances are not *prima facie* an excuse for not rectifying the above conditions.¹⁵⁵

¹⁵² For example see, *Soering v. the United Kingdom*, above, fn. 14, para, 64. The nineteenth century Russian writer and political activist, Fyodor Dostoevsky, famously described the psychological impact of the death sentence on an individual. He stated:

“After all, the greatest, the most intense pain lies not so much in injuries perhaps, so much as the fact that you know for certain that in an hours time, then in ten minutes, then thirty seconds, then now, at this moment, the soul will take wings from the body and you will cease to be a man.”

Fyodor Dostoevsky, *The Idiot*, (Oxford: Oxford University Press, 1993), p. 23. See pages 21-23 for his monologue on the inhumanity of the death penalty.

¹⁵³ See the Ukrainian cases above, fns. 50 and 67.

¹⁵⁴ See *Soering* above, fn. 14, and *ibid.*

¹⁵⁵ *Poltoratskiy* above, fn. 50, para 148; *Kuznetsov* above, fn. 67, para 128; *Nazarenko* above, fn. 67, para 144; *Dankievich* above, fn. 67, para 144; *Aliiev* above, fn. 67, para 151; *Khokhlich* above, fn. 67, para 181; see also, Philip Leach, *Taking a Case to the European Court of Human Rights*, 2nd ed, (Oxford: Oxford University Press, 2005), p. 210.

In *Iorgov v. Bulgaria* and *G.B. v. Bulgaria* the Court held that a violation of Article 3 had occurred because of the detention conditions in Sofia Prison including isolation in cells for 23 hours per day and minimal contact with other inmates and family.¹⁵⁶ The Court relied on the CPT report in 1995 which recorded the results of a visit to Stara Zagora Prison, and the Court used the findings for comparative analysis.¹⁵⁷ Furthermore, in *Ilaşcu and others v. Russia and Moldova*¹⁵⁸ the Court held that the death sentence, strict isolation for eight years and the anxiety of the death sentence, in the Moldovian Republic of Transdniestria, were acts of torture within the meaning of Article 3.¹⁵⁹ The Court relied on the CPT's report on Moldova which included a visit to the region of Transdniesta. The CPT doctors examined Ilaşcu and the other applicants who were detained for eight years under conditions of solitary confinement. The CPT stated that "solitary confinement could, in certain circumstances, amount to inhuman and degrading treatment."¹⁶⁰

The analysis of the incarceration conditions have been used to challenge the Member State's capital judicial systems. This is clearly demonstrated as an effective human

¹⁵⁶ *Iorgov v. Bulgaria*, above, fn. 126, para 48-50; *G.B. v. Bulgaria*, above, fn. 126, para 49-50.

¹⁵⁷ *The Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 26 March to 7 April 1995*, CPT /Inf (97) 1.

¹⁵⁸ *Ilaşcu and others v. Russia and Moldova*, Application No. 48787/99, 8 July 2004.

¹⁵⁹ *ibid*, paras 429, 430 and 440. This is in contrast with Abdullah Öcalan's imprisonment on İmralli Island, where his cell and bed was an adequate size, he had a table a bookcase, air conditioning and a window. See *Öcalan v. Turkey*, above, fn. 41, para 333, when the Grand Chamber cited the CPT Report in 2001.

¹⁶⁰ *The Report on the visit to the Transnistrian region of the Republic of Moldova carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 27 to 30 November 2000*, CPT/Inf (2002) 35, para 289.

rights policy. But what would happen if the CPT was so successful in their recommendations to new and existing Member States, that countries wishing to reintroduce the death penalty, remedy the structural problems to create a “humane” death row? This question is perhaps answered in two ways. Firstly, as the death penalty is now removed under *Protocol No. 6* and *Protocol No. 13*, the constructions of new death rows is more a hypothetical possibility than a real prospect. Secondly, no matter how comfortable a death row prison may be, such conditions could not negate the psychological impact and mental torture of the impending execution, and the physical torture of the execution itself. These issues are now explored in more detail.

6.10 Methods of Execution

There is a distinct lacuna in the jurisprudence concerning execution methods. As detailed in Chapter Three, it is seen that hanging adopted in the United Kingdom was not challenged in the 1950s, and Caroline Ravaud and Stephan Trechsel note specifically that neither the garrote in Spain nor the guillotine in France was challenged within the Commission when executions were implemented in the 1970s.¹⁶¹ The European Commission of Human Rights decision in *Soering* considered the application of the electric chair¹⁶² but the decision in the appeal to the

¹⁶¹ Caroline Ravaud and Stephen Trechsel, ‘The death penalty and case-law of the institutions of the European Convention of Human Rights,’ in Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Publishing, 2004), p. 85.

¹⁶² *Soering v. the United Kingdom*, Application No. 14038/88, 19 January 1989, para 141-143, where the Commission held that electrocution did not “attain a level of severity contrary to Article 3.”

Court did not specifically rule on the method of execution. It confined its holding to state that the accumulative effects of death row caused the death row phenomenon, and the method of execution was placed within this analysis. A separate consideration of the electric chair was not provided.

In *N.E. v. the United Kingdom*, the applicant was being extradited to Florida to face a capital trial and if convicted he would face the electric chair, but before the Commission could adjudicate on the case the applicant withdrew his petition.¹⁶³ In *Dejbakhsh and Mohmoud Zedeh v. Sweden*, the applicant claimed that she would be sentenced to death by stoning if deported back to Iran. However, the Court found no merit in her claim and declared the petition inadmissible and did not rule on the execution method.¹⁶⁴

There is currently no specific decision of the Court concerning the method of execution, and on its face, another example of the harmonisation of Article 2(1) with Article 3 would prevent the Court from holding that executions are *per se* inhuman. However, it would *prima facie* appear extremely difficult for the Court to find that any execution method did satisfy the *Convention*, the Protocols, and the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*.¹⁶⁵ Furthermore, the Parliamentary Assembly has specifically attempted

¹⁶³ *N.E. v. the United Kingdom*, Application No. 10308/83, (1985) 37 DR 158, p. 184.

¹⁶⁴ In *Dejbakhsh and Mahmoud Zedeh v. Sweden*, Application No. 11682/04, admissibility decision, 13 December 2005.

¹⁶⁵ *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Strasbourg, above, fn. 143.

to create a human rights principle which would nullify the acceptance of any execution method when it stated in its 1980 Report that:

none of the execution methods employed today succeeds in completely eliminating the physical suffering which necessarily accompanies violent death, since death cannot be instantaneous. To this must be added the mental and moral suffering caused by long periods of waiting and by uncertainty.¹⁶⁶

and also:

[c]apital punishment certainly constitutes “inhuman and degrading treatment or punishment,”¹⁶⁷ both by its very nature and by the awesome, even revolting character of an execution, whatever the procedure chosen.¹⁶⁸

In 1980 the Parliamentary Assembly did not think that any method of execution could satisfy Article 3 and the prohibition of inhuman punishment could be used to scrutinise each execution method. The Amnesty International expert on the death penalty, Eric Prokosch, gave evidence to the Legal Affairs Committee on 21 December 1987. He argued:

[w]hen a prisoner is given electric shocks, it is torture which is unacceptable under any circumstances. Why could it be acceptable to attach electrodes to a

¹⁶⁶ Report, above, fn. 2, p. 6 para 2.

¹⁶⁷ *ibid*, quoting *Convention* Article 3.

¹⁶⁸ *ibid*, p. 13.

prisoner's body and give such a massive jolt of electricity that is life extinguishing? It is torture when a prisoner is forced to renounce his or her beliefs by the terrifying threat of being killed. Why then is it acceptable to keep a prisoner for days and years contemplating his promised death at the hands of the state? What is the death penalty if not the ultimate form of torture?¹⁶⁹

Prokosch's compelling testimony challenges the very legitimacy of the death penalty in that it can be argued that the pain inflicted in an execution is indistinct from torture, and thus inhuman. He has further maintained that "[t]he cruelty of torture is evident. Like torture, an execution constitutes an extreme physical and mental assault on a person already rendered helpless by government authorities."¹⁷⁰ To affirm the argument that the death penalty is akin to torture, Hans Göran Franck stated in his 1994 Report that:

[a]nother argument against the death penalty is that the execution itself might involve physical torture, because the execution methods used today cannot be guaranteed to cause instantaneous death in all cases. Errors in the judgment of the executioner can lead to torturous strangulation when hanging is the method of execution, and extreme pain and suffering when it is shooting, electrocution, lethal injection or gassing, beheading or stoning. It might be concluded on this

¹⁶⁹ *Report on the abolition of capital punishment*, Doc. 7154, 15 September, 1994, para 9.

¹⁷⁰ Eric Prokosch, 'The death penalty verses human rights,' p. 18, in Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Press, 1999). Furthermore, Timothy Kaufman-Osborn has argued that it is an "oxymoronic question" to attempt to humanise executions, see Timothy V. Kaufman-Osborn, *From Noose to Needle: Capital Punishment and the Late Liberal State*, (Ann Arbor: The University of Michigan Press, 2002), p. 183.

evidence that an execution constitutes cruel, inhuman or degrading treatment or punishment as banned by several international legal instruments, such as the ECHR.¹⁷¹

Franck also affirmed that the “brutal execution methods and long periods inmates on death row spend waiting for executions can be likened to a form of torture.”¹⁷² Both the 1980 and 1994 Parliamentary Reports and the work of Franck and Prokosch, would support a *Convention* discourse that no method of execution can be humane and the punishment is therefore not legitimate or justified.¹⁷³ Furthermore, the Oxford Ethicist, Jonathan Glover, has observed, “there is something so cruel about the kind of death in capital punishment that this rules out the possibility of it being justified.”¹⁷⁴ The work cited above clearly calls into question the legitimacy of the sovereign imposition of executions. Below we now consider further the question of how Article 3 has been used to de-legitimise the punishment.

6.11. The Death Row Phenomenon

¹⁷¹ Report, above, fn. 170, para 9. The report omits hanging as a method of execution.

¹⁷² Hans Göran Franck, *The Barbaric Punishment: Abolishing the Death Penalty*, (ed: William A. Schabas) (The Hague: Martinus Nijhoff, 2003), pp. 35.

¹⁷³ See, Tom Goeghegan, ‘The search for a humane execution,’ BBC News, 14 July 2008. I was interviewed by the BBC to respond to Michael Portillo’s quest to search for a humane execution method for the BBC Horizon series.

¹⁷⁴ Jonathan Glover, *Causing Death and Saving Lives*, (London: Penguin, 1990), p. 231.

The accumulative affects of the capital judicial system can be identified as the “death row phenomenon.” This was first recognised in *Kirkwood v. the United Kingdom*,¹⁷⁵ as being the circumstances which lead to an inmates’ prolonged detention on death row leading to his execution. Kirkwood argued that the Article 3 prohibition against inhuman and degrading treatment and punishment was violated by the “inordinate delay in carrying out the death penalty in California,” and that “after he has completed all possible appeals...in the interval he will be exposed to the rigours of the death row phenomenon.”¹⁷⁶ The applicant further stated that “[s]uch a delay, coupled with the uncertainty of the outcome, would act on the applicant’s mind in such a way as to subject him to inhuman and degrading treatment or punishment.”¹⁷⁷ The *Soering* Court confirmed that the death row phenomenon:

¹⁷⁵ *Kirkwood v. the United Kingdom*, above, fn. 14, p. 165. Under the heading, ‘Implementation of the Death Penalty and the “Death Row” Phenomenon,’ the European Commission of Human Rights considered the fluctuation of the total number of people on death row in California and the time inmates waited on death row during their appeals up to their execution. Up to March 1983, the longest an inmate had to wait following appeals was a period of 5 years.

¹⁷⁶ *ibid*, p. 166. For a consideration of municipal constitutional court cases on the death row phenomenon see, Schabas, above, fn. 31, pp. 96-115; Markus G. Schmit, ‘The Death Row Phenomenon: A Comparative Analysis,’ pp. 47-72, in Theodore S. Orlin, Allan Rosas and Martin Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*, (Åbo: Åbo Akademi University Press, 2000).

¹⁷⁷ *ibid*, p. 171. A year before the Kirkwood decision, David Pannick argued that a “legalistic society will be unable to impose the death penalty without an unconstitutionally cruel delay, and hence it will be unable lawfully to impose the death penalty at all,” in *Judicial Review of the Death Penalty* (London: Duckworth, 1983), p. 84.

may be described as consisting in a combination of circumstances to which the applicant would be exposed if, after having been extradited to Virginia to face a capital murder charge, he were sentenced to death.¹⁷⁸

William Schabas observed that “[w]ith the European Court’s judgment in *Soering*, the term ‘death row phenomenon’ entered the mainstream of human rights vocabulary.”¹⁷⁹ He has argued that following the *Soering* decision, “prolonged detention of a person awaiting execution is *per se* cruel, inhuman and degrading treatment.”¹⁸⁰

Schabas also argued that in *Çinar v. Turkey*, the Commission adopted a “large view” of *Soering* because it did not consider all the extenuating circumstances¹⁸¹ As such the material circumstances of the death row phenomenon are intricately connected with Article 3, and they appear to be fluid concepts and change from case to case. In effect, what factors contribute to the phenomenon can be all or a selection of the issues discussed above.

6.12 The Death Penalty as an Illegitimate Punishment

¹⁷⁸ *Soering*, above, fn. 14, para 81. Patrick Hudson describes the death row phenomenon as “prolonged delay under the harsh conditions of death row,” above, fn. 135, p. 836.

¹⁷⁹ Schabas, above, fn. 31, p. 115.

¹⁸⁰ William A. Schabas, ‘International law and the death penalty: reflecting change or promoting change?’ in Peter Hodgkinson and William Schabas, (eds) *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004), p. 57.

¹⁸¹ *Çinar v. Turkey*, above, fn. 135, pp. 8-9, and see Schabas, above, fn. 13, p. 276.

Each aspect of the Article 3 analysis detailed in this chapter can also be viewed through a discussion on whether the death penalty is now considered to be an illegitimate punishment. The Parliamentary Assembly approach to Article 3 and the death penalty can be seen to adopt the liberal tradition of identifying “legitimate” state practice. This is a shift in discourse analysis and an attempt to formulate a new human rights position from which to tackle the death penalty. In its historical context, as set out in Chapters Two and Three, the death penalty was considered to be a legitimate penal practice.

A recognisable shift in the human rights narrative occurred within the Parliamentary Assembly in 1994, when the then new *rapporteur*, Hans Göran Franck,¹⁸² who was the author of a 1994 ‘Report on the Abolition of Capital Punishment,’ stated:

[t]he Assembly considers that the death penalty has *no legitimate place in the penal systems of modern civilised societies*, and that its application may well be compared with torture and can be seen as inhuman and degrading punishment within the meaning of Article 3 of the ECHR.¹⁸³ (emphasis added)

The Parliamentary Assembly proposed that “modern civilised societies” in the Council considered the death penalty was not “legitimate” and hence an unjustifiable punishment. What had changed was that Article 3 was now analysed through a new

¹⁸² *Report on the Abolition of Capital Punishment*, Doc. 7154, 15 September 1994.

¹⁸³ *ibid*, para 3 Costas Douzinas has observed that “human rights have been turned from a discourse of rebellion and dissent into that of state legitimacy,” *The end of Human Rights: Critical Legal Thought at the Turn of the Century*, (Oxford: Hart Publishing, 2000), p. 7.

human rights threshold and this was supported by placing it next to the generally accepted notion in international law of the illegality of torture.¹⁸⁴ Furthermore, Roger Hood has noted that the “death penalty is an extreme example of torture, a form of punishment that violates human rights. It is therefore an illegitimate mode of punishment for a state to employ.”¹⁸⁵

This rhetoric has been repeated by the *rapporteur*, Renate Wohlwend when she affirmed the 1994 position in a 2001 Resolution which stated, “The Assembly considers that the death penalty has no legitimate place in the penal systems of modern civilised societies, and that its application constitutes torture and inhuman and degrading punishment within the meaning of Article 3 of the European Convention on Human Rights.”¹⁸⁶

¹⁸⁴ *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*; Malcolm D. Evans and Rod Morgan, *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, (Oxford: Clarendon Press, 1998); Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture*, (Oxford: Oxford University Press, 2008).

¹⁸⁵ Roger Hood, ‘Introduction: The Importance of Abolishing the Death Penalty,’ p. 9, Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Publishing, 1999); and *ibid*, p. 13, Council of Europe, *Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004). Hood also stated, “It is counter productive in the moral message it conveys, for it legitimises the very behaviour – killing – which the law seeks to repress,” in *ibid*.

¹⁸⁶ Resolution 1253 (2001) *abolition of the death penalty in Council of Europe observer states*, text adopted by the Assembly on 25 June 2001 (17th sitting), Part 1, para 1, and IV 1. inhuman and degrading, in Recommendation 1246 (1994) *on the abolition of capital punishment*, text adopted by the Assembly on 4 October 1994; Resolution 1187 (1999) *on Europe – a death penalty-free continent*, text adopted by

Post *Protocol No. 6* there appears to be no turning back from the repeated expression of this position that the death penalty is illegitimate because it is inhuman. This is affirmed within successive Parliamentary Assembly Reports and Resolutions up until the adoption of *Protocol 13* in 2003. In 2001, the Report, *Abolition of the death penalty in Council of Europe observer states*, stated “[t]he Assembly considers that the death penalty has no legitimate place in the penal systems of modern civilised societies, and that its application constitutes torture and inhuman and degrading punishment within the meaning of Article 3 of the European Convention of Human Rights.”¹⁸⁷ The *Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances*, stated “[t]he Assembly...reaffirmed its beliefs that the “application of the death penalty constitutes inhuman and degrading punishment.”¹⁸⁸

In 2003, Resolution 1349 stated, “[t]he Assembly once more reaffirms its complete opposition to capital punishment, which has no legitimate place in the penal systems of modern civilised societies. The Assembly considers that its application constitutes

the Standing Committee, acting on behalf of the Assembly on 26 May 1999, para 1, as it, “reaffirms the belief that the application of the death penalty constitutes inhuman and degrading punishment.”

¹⁸⁷ *Report, Abolition of the death penalty in Council of Europe observer states*, Doc. 9115, 7 June 2001, para 1.

¹⁸⁸ *Draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances*, Doc. 9316, 15 January 2002. I Draft Opinion, para 2.

torture and inhuman and degrading punishment, and is thus a severe violation of universally recognised human rights.”¹⁸⁹ Furthermore, Wohlwend stated in 2006 that:

[o]ver the past twelve years, the Parliamentary Assembly has adopted no fewer than five resolutions and four recommendations on the abolition of the death penalty, ceaselessly reaffirming its absolute opposition to capital punishment, which it regards as an act of torture and an inhuman and degrading punishment, and undeniably the most serious of all human rights violations.¹⁹⁰

And in 2007 it was again affirmed through the Directorate General of Human Rights that the, “death penalty is in clear violation of the...right not to be subjected to cruel, inhuman and degrading treatment.”¹⁹¹ Furthermore, the Committee of Ministers was now changing its language on Article 3, as it declared in 2007 that the “Committee of Ministers wishes to reiterate its firm opposition to the death penalty which constitutes

¹⁸⁹ Resolution 1349 (2003) *Abolition of the death penalty in Council of Europe observer states*, text adopted by the Assembly on 1 October 2003 (30th sitting), para 2.

¹⁹⁰ *Report, Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, Doc. 10911, 21 April 2006; B. Explanatory Memorandum, by Mrs. Renate Wohlwend, para 1. See also, Renate Wohlwend, ‘The Role of the Council of Europe’s Parliamentary Assembly,’ p55 in Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Publishing, 1999), and *ibid* p. 65 in, Council of Europe, *The Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Press, 2004).

¹⁹¹ Council of Europe, *Death is not Justice: The Council of Europe and the Death Penalty*, (Strasbourg: Directorate General of Human Rights, 2007), p. 15.

an inhuman punishment in contradiction with the fundamental right to life which everyone must enjoy.”¹⁹²

The Council is now explicitly formulating a new human rights platform for attacking the death penalty, and Article 3 is now the primary *Convention* Article for achieving this aim. This shift in the scrutiny of the death penalty is pushing the boundaries of European human rights discourse. Upendra Baxi, the human rights expert, has noted that “state sovereignty may no longer articulate itself wholly outside the zones of human rights to the point of restoration of legitimacy.”¹⁹³ Costas Douzinas has observed “the recognition that human rights have the ability to create new worlds, by pushing and expanding the boundaries of society, identity and law.”¹⁹⁴

Specifically concerning the boundaries of the prohibition of inhuman treatment as it is applied to the death penalty, Manfred Nowak has argued that the original acceptance that the death penalty is not a violation of inhuman treatment has, “been superseded

¹⁹² *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty, Parliamentary Assembly Recommendation 1760 (2006)*, Reply adopted by the Committee of Ministers on 31 January 2007, at the 985th meeting of the Ministers’ Deputies, CM/AS(2007)Rec1760 final, 2 February 2007, para 2.

¹⁹³ Upendra Baxi, *The Future of Human Rights*, 2nd ed, (New Delhi: Oxford University Press, 2006), p. 3

¹⁹⁴ See, Douzinas, above, fn. 184. In attempting to create a new human rights principle, the Parliamentary Assembly is advancing what Douzinas has observed as “the recognition that human rights have the ability to create new worlds, by pushing and expanding the boundaries of society, identity and law,” p. 343.

by a dynamic interpretation of these legal terms in light of modern criminological experiences and socio-political developments.”¹⁹⁵

Roger Hood and Carolyn Hoyle have also joined in this question of legitimacy as a means to attack the death penalty. In referring to Resolution 1044 (1994) they argue that the question of legitimacy identifies that the Council have identified a “principled opposition to the death penalty as a violation of fundamental human rights.”¹⁹⁶ They also note that the “language is uncompromising. The Europeans will not accept the argument that capital punishment can be defended on relativistic grounds of religion or culture, or as a matter which sovereign powers ought to be left to decide simply for themselves.”¹⁹⁷

This is the central point. The Council is formulating a discourse which challenges the very sovereign right of the death penalty, and determining that the state can no longer decide the punishment for themselves. The Parliamentary Assembly does not now place any limitations on its formulation of human rights arguments. Leon Radzinowicz observed that the Council’s strategy against the death penalty has “no restrictions of any kind,” and that it “became a universal question, an almost transcendental, absolute issue to be agitated for and put into effect, without regard for time, place, ethnicity or political system.”¹⁹⁸

¹⁹⁵ Nowak, above, fn. 15, p. 44.

¹⁹⁶ Hood and Hoyle, above, fn. 103, p. 25.

¹⁹⁷ *ibid.*

¹⁹⁸ Leon Radzinowicz, *Adventures in Criminology*, (London: Routledge, 1999), pp. 281-2.

Indeed, Franck's 1994 Report on the abolition of capital punishment displays an uncompromising stance as it is stated:

the death penalty must be abolished because it is inhuman and thus incompatible with our system of values...Capital punishment must come to be regarded in the same way as any other "cruel, inhuman or degrading treatment and punishment" for the world to become a better place where mankind can live in peace and prosperity; this means the death penalty has to be abolished for all offences, be they peace-time or war-time offences, as soon as possible – worldwide.¹⁹⁹

Here Franck was presenting a consequentialist argument within utilitarian thought. If the death penalty is abolished the result would make for the "world to become a better place where mankind can live in peace and prosperity." The "greatest good"²⁰⁰ for society, not just Europeans, but the whole world's, is contributed to through the understanding that the death penalty is "cruel, inhuman or degrading."²⁰¹

¹⁹⁹ *Report on the abolition of capital punishment*, Doc. 7154, 15 September, 1994, para 10.

²⁰⁰ Jeremy Bentham argued the central tenet of utilitarianism as, "By utility is meant the property in any object, whereby it tends to produce benefit, advantage, pleasure, good or happiness...or...to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual," in Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, (ed J.H. Burns and H.L.A. Hart, 1970), cited in M.D.A. Feldman, *Lloyd's Introduction to Jurisprudence*, (London: Sweet and Maxwell, 2001), p. 222.

²⁰¹ The use of the term "cruel" may be seen as a comparison with the United States Constitution, 8th Amendment prohibition of "cruel and unusual punishment," and it would be accommodated within the Parliamentary Assembly's worldwide focus.

As such, the Parliamentary Assembly is seeking to create a norm against the death penalty. William Schabas has noted:

[i]nternational law may also prohibit capital punishment by implication, through the effect of other norms that do not explicitly call for abolition, and more specifically by the prohibition of cruel, inhuman, and degrading treatment or punishment.²⁰²

The Parliamentary Assembly's use of the term "legitimacy" as a principle of democratic values has not gone unnoticed by the European Court of Human Rights. In the Chamber judgment of *Öcalan v. Turkey*, the Court noted that the established trend of abolition of the death penalty, reflected that the Member States no longer see the death penalty "as having any legitimate place in a democratic society," and if imposed following an unfair trial it amounted to "a form of inhuman treatment."²⁰³ Hood and Hoyle have also noted this issue from the judgment, and pointed to the connection of the death penalty as an inhuman punishment and the question of its legitimacy within democratic society.²⁰⁴

However, the Court had placed the Member State as the *arbiter* of legitimate penal sanctions, as opposed to the Parliamentary Assembly, as in two Bulgarian cases it stated:

²⁰² Schabas, above, fn. 39, p. 425.

²⁰³ *Öcalan v. Turkey* above, fn. 32, para. 207.

²⁰⁴ Hood and Hoyle, above, fn. 103, p. 27.

[h]aving regard to the *rejection by the Contracting States of capital punishment, which is no longer seen as having any legitimate place in a democratic society* (forty-three states have abolished it and the remaining State, Russia, has introduced a moratorium), the imposition of capital punishment in certain circumstances, such as after an unfair trial, must be considered, in itself, to amount to a form of inhuman and degrading treatment.²⁰⁵ (emphasis added)

These cases demonstrate a specific evolution in the Court's jurisprudence on the death penalty. However, in this initial stage, the Court's adoption of the word "legitimate" is not used in the same way as the Parliamentary Assembly. The Court merely uses the word to hold that a death penalty is not legitimate following an unfair trial, and in such circumstances it would constitute inhuman and degrading treatment. So far the Court has not used the word "legitimate" to iterate that the death penalty is *per se* a violation of Article 3 and the jurisprudence of the European Court of Human Rights, can be read as a restriction of the human rights pronouncements in the Parliamentary Assembly, the Committee of Ministers and the above mentioned scholarship on human rights.

6.13 Conclusion

²⁰⁵ *G.B. v. Bulgaria*, above, fn. 126, para 72; and stated verbatim in *Iorgov v. Bulgaria*, above, fn. 126, para 72.

This chapter has engaged with the evolution of the interpretation of Article 3. It is argued that although Article 3 has not been used to completely trump Article 2(1), it can now be used to demonstrate that the application of the death penalty by a Member States is inhuman punishment. We have witnessed an evolution in the Article 3 jurisprudence by the Commission and Court, but the judicial bodies have not gone as far as the Parliamentary Assembly would like. As such we see that the Court is reigning in the Assembly's attempted discourse to push the boundaries of Article 3 interpretation. One of the problems, as set out in the previous chapter, is that the text of Article 2(1) prevents the Court from holding that the punishment is *per se* inhuman. There are grounds for arguing that the Court is behind the times on this specific issue.

Furthermore, the relationship of the Member States with the death penalty has not gone away, but it appears that, unlike with the jurisprudence on Article 2(1), Article 3 offers greater scope for penetrating this relationship. As such, the jurisprudence and the Assembly discourse, has been extremely successful in utilizing Article 3 for creating a "death penalty-free" zone of the Council. The Assembly and the Court's adoption of a new human rights position which aligns the Article 3 analysis with "legitimate" government, has contributed to this success. As such the human rights language of Article 3 is evolving to encompass a greater sphere of expression with which to renounce the death penalty. This has the potential to challenge the very right of the Member State to impose the death penalty.

We now consider in the following chapter whether the Council has been successful in employing this evolved discourse to the expansion of Membership to include Central

and Eastern European states. Furthermore, it will be considered how the Council has built upon its successes in removing the death penalty from its region when it joined the European Union and the Organisation for Security and Co-operation in Europe, in initiating arguments against the punishment on a global scale.

Chapter Seven:
The Expansion of the Council of Europe and the Exporting of
the Discourse Against the Death Penalty

7. The Expansion of the Council of Europe and the Exporting of the Discourse Against the Death Penalty

7.1 Introduction

A test of the solidity of the Council's discourse would be to see how it has coped with the challenges posed during expansion through Central and Eastern Europe post-1994, and also to see how this discourse has been accepted internationally by the Council Observer States, and the European Union (hereinafter "EU") and the Organisation for Security and Cooperation in Europe (hereinafter, "OSCE") during their international initiatives against the death penalty.

This thesis has recounted a legal history displaying that the Council's human rights discourse can be seen as intricately restricting the Member State's sovereign right of the death penalty. It has evolved into a hegemonic political force through the evolved arguments which renounce the death penalty. Hence, the aim of Part One of this chapter is to investigate whether this hegemony was extended into Central and Eastern Europe, as the Council expanded. Would the evolved arguments be embraced by the new joining countries? The evolution of the *Convention* human rights standards have demonstrated that it now is utilised to challenge the capital judicial systems of sovereign states, but have the Central and Eastern European states accepted this elevation of human rights and in a political and legal acceptance sign and ratify *Protocol No. 6* and from 2002, *Protocol No. 13*?

Part Two engages with the Council's further globalising of its discourse. The strength of its arguments and the acceptance of human rights standards by countries outside of the Council's sphere are tested. This analysis scrutinises the impact of the evolved human rights standards on the sovereignty of states internationally. It firstly analyses the effectiveness of the human rights arguments on Observer States to the Council. These states are not official members but they have a partial association. The investigations are then taken to a wider focus concerning the Council's relationship with the EU and the OSCE. Specific examples are explored including the Council and EU's efforts in the United Nations General Assembly and the passing of the Resolution on a moratorium on the death penalty.¹

Then the Council and EU as *amici* in the United States Supreme Court is considered and it is questioned whether the Council's internationalising of its arguments are adopting more complex mechanisms which not only enhance its global position, but also strengthens its evolved regional position. This part concludes with the Council's support of the OSCE. It will be questioned whether this region has been the least effective in challenging the sovereign right of the death penalty through human rights arguments and dialogue.

This chapter is primarily concerned with investigating the effectiveness of the Council's discourse globally, and whether the organisation can be seen as contributing to a global norm against the punishment. It is also concerned with

¹ *Moratorium on the use of the death penalty*, A/RES/62/149, 76th Plenary Session, 18 December 2007.

displaying whether the internationalising of the arguments has any significance for its regional position.

7.2 The Expansion of the Council of Europe

7.2.1 The Dialogue Between the Parliamentary Assembly and the Committee of Ministers

It is now historical record that in 1989 the “fall of the Berlin Wall fundamentally changed the European political landscape.”² The dismantling of the dividing line between Western and Central and Eastern Europe paved the way for open dialogue. The Council was able to advance the spirit of its *Statute* to all European countries and promote democratic pluralism, human rights, and the rule of law.³ In 1993 for the first time in the history of the Council, all the Member State governments met at the Vienna Summit. The adopted *Vienna Declaration* opened with the grand statement:

[t]he end of the division of Europe offers an historic opportunity to consolidate peace and stability on the continent. All our countries are committed to

² Hans Christian Krüger, *Protocol No. 6 to the European Convention on Human Rights*, p. 70, in Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Publishing, 1999); and *ibid*, *Protocol No. 6 to the European Convention on Human Rights*, p. 87, in Council of Europe, *Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

³ *Statute of the Council of Europe*, ETS. 001, 1949, Articles 1 and 3.

pluralist and parliamentary democracy, the indivisibility and universality of human rights, the rule of law and a common cultural heritage enriched by its diversity. Europe can thus become a vast area of democratic security.⁴

Every Member State was expected to be committed to this homogenous vision and it marked a uniform renunciation of totalitarian and communist regimes.⁵ Laying a secure platform for the future of the Council was a paramount consideration and the *Vienna Declaration* stated in meeting the future challenges which will face the organisation that expression must be given “in the legal field to the values that define our European identity.”⁶

It concluded that countries wishing to join the Council must, within a specified period, sign the *Convention* and accept the jurisdiction of the *Convention's* supervisory machinery.⁷ Roger Hood described the Vienna Summit's condition of

⁴ *Vienna Declaration*, Decl-09.10.93E, 9th October 1993.

⁵ *ibid*, fifth paragraph, “The Council of Europe is the pre-eminent European political institution capable of welcoming, on an equal footing and in permanent structures, the democracies of Europe freed from communist oppression. For that reason the accession of those countries to the Council of Europe is a central factor in the process of European construction based on our Organisation's values.”

⁶ *ibid*, ninth paragraph. It is beyond the scope of this thesis to consider the various difficulties of recognising a common “European identity,” or a “European consciousness” and only the specific issue of identifying a “European identity” as it concerns the death penalty, is considered. The difficulties of recognising a general “European identity” have been argued *inter alia* by Gerard Delanty, *Inventing Europe: Idea, Identity, Reality*, (London: Macmillan, 1995) and Chris Shore, *Building Europe: The Cultural Politics of European Integration*, (London: Routledge, 2000).

⁷ *ibid*, sixth paragraph.

acceptance of the *Convention* system as the “most important political decision”⁸ for the furtherance of human rights. Indeed, only one year after the *Vienna Declaration*, the Parliamentary Assembly sought to establish that an intrinsic component of such “European identity” was recognised through the organisation’s discourse against the death penalty.

In 1994 Hans Göran Franck promoted this abolitionist agenda.⁹ He authored a Report which initially focused on clearing up the existing capital laws within Member States. At this time although the Western Member States had removed the death penalty for ordinary crimes, *Protocol No. 6* had not been signed and ratified by all of them.¹⁰ As a consequence there was not a completely unified, and centralised, position against the punishment. Franck argued that a “control mechanism” should be set up under the Secretary General to analyse existing Member State’s legislation on the death penalty. He also maintained that those states enjoying “special guest status,”¹¹ should be obliged to abolish the punishment and that “all states whose legislation still provides for the death penalty to set up a

⁸ Roger Hood, *Introduction: The Importance of Abolishing the Death Penalty*, p. 11, in Council of Europe, *The Death Penalty: Abolition in Europe* (Strasbourg: Council of Europe Publishing, 1999); *ibid*, *Introduction: The Importance of Abolishing the Death Penalty*, p. 16, in Council of Europe, *The Death Penalty: Beyond Abolition* (Strasbourg: Council of Europe Press, 2004).

⁹ See, Hans Göran Franck, *The Barbaric Punishment: Abolishing the Death Penalty*, (ed. William A. Schabas) (The Hague: Martinus Nijhoff, 2003), p. 64.

¹⁰ These countries are listed here and the ratification dates are in brackets: Belgium (1998), Estonia (1998), Greece (1998), Ireland (1994), Romania (1994), Russia (still to ratify), Slovenia (1994), and United Kingdom (1999).

¹¹ *Report on the abolition of capital punishment*, Doc. 7145, 15 September 1994, para 6 (ii).

commission as soon as possible in their country with a view to abolishing capital punishment.”¹²

A universal abolition position would lay the foundation for the expectation that new Member States should follow suit. A Draft Resolution was included in the Report which called for the signature and ratification of *Protocol No. 6* to be a prerequisite for membership.¹³ A Resolution was adopted which stated that the “willingness to ratify the protocol be made a prerequisite for membership.”¹⁴ To affirm the Resolution, a Recommendation was sent to the Committee of Ministers inviting it to implement the outlined provisions.¹⁵

However, a difficult dialogue arose between the Assembly and the Committee. It concerned the prerequisite standards for membership, and also, the affirmation of the abolition position for existing members. The Committee did not initially respond to the 1994 provisions and in 1996, the Assembly adopted a further Recommendation calling on the Committee of Ministers to respond.¹⁶ This prompted the Assembly to reaffirm its position and in a Resolution in 1996 it stated:

¹² *ibid*, para 6 (ii)(a).

¹³ *ibid*, Part II: Draft Resolution paras 5-6.

¹⁴ Resolution 1044 (1994) *on the abolition of capital punishment*, text adopted by the Assembly on the 4 October 1994, (25th sitting), para 6.

¹⁵ Recommendation 1246 (1994) *on the abolition of capital punishment*, text adopted by the Assembly on the 4 October 1994, (25th sitting).

¹⁶ Recommendation 1302 (1996) *on the abolition of the death penalty in Europe*, text adopted by the Assembly on 28 June 1996 (24th Sitting). This Recommendation was adopted following the *Report*

[w]ith reference to Resolution 1044 (1994), the Assembly reminds applicant states to the Council of Europe that the willingness to sign and ratify Protocol No. 6 to the European Convention on Human Rights and to introduce a moratorium upon accession *has become a prerequisite* for membership of the Council of Europe on the part of the Assembly (emphasis added).¹⁷

The Assembly did not wait for specific affirmation from the Committee and developed its own membership criteria. The language had clearly shifted from the invitation that states display a “willingness” to adopt the specified penal changes, to it becoming “a prerequisite for membership.” The Committee then provided interim replies,¹⁸ but it did not deal specifically with the Assembly’s points and instead made reference to the Final Declaration of the Second Summit held in Strasbourg on 10-11 October 1997.¹⁹ It sidestepped the call for a requirement of the need for prospective Member States to ratify *Protocol No. 6*, emphasising instead the “maintenance, in the meantime, of existing moratoria of executions in Europe.”²⁰

on the abolition of the death penalty in Europe, Doc. 7589, text adopted by the Assembly on 28 June 1996 (24th sitting).

¹⁷ Resolution 1097 (1996) *on the abolition of the death penalty in Europe*, text adopted by the Assembly on 28 June 1996 (24th Sitting), para 6.

¹⁸ See, Notes on the Agenda; Reference Documents, 628/4.6, Abolition of the death penalty in Europe: Draft Reply to Recommendation 1246 (1994) and 1302 (1996) of the Parliamentary Assembly; 555th meeting (January 1996) and 588th meeting (April 1997).

¹⁹ Second Summit of Heads of State and Government of the Council of Europe, Strasbourg, 10-11 October, 1997: Final Declaration.

²⁰ *ibid.*

Following the preference of moratoria over the explicit calls for signature and ratification of *Protocol No. 6*, the Committee stated “it considers it important to act in partnership and constructive dialogue with the Assembly.”²¹ The Committee instructed the Rapporteur Group on Human Rights to examine both Recommendations with a view to proposing a draft reply.²² This was not to the satisfaction of the Assembly. In their Recommendation 1302, although welcoming the Committee’s encouragement for the continuation of moratoriums in Europe, it regretted that the “Committee of Ministers had not yet taken any action on the most important proposals,” which concerned the promotion of complete Member State ratification of *Protocol No. 6*, prospective Member States ratification, and the future legislation of *Protocol No. 13*.²³

The Assembly recommended that the Committee follow up the proposals “without further delay,” draw up the additional protocol, prohibit current Member States from reintroducing the death penalty, and consider the “attitude of applicant states towards the death penalty when deciding on their admission as full members to the Council of Europe.”²⁴

²¹ Reply to Recommendation 1246 (1994 and Recommendation 1302 (1996) from the Committee of Ministers, Doc. 8079, 21 April 1998, 628th meeting of the Minister’s Deputies.

²² See, Notes on the Agenda; Reference Documents, 628/4.6, Abolition of the death penalty in Europe: Draft Reply to Recommendation 1246 (1994) and 1302 (1996) of the Parliamentary Assembly.

²³ Recommendation 1302, above, fn. 16.

²⁴ *ibid*, para 2.

This dialogue displayed a more aggressive attitude on the part of the Assembly and a somewhat cautious approach by the Committee. In its Interim Reply to Recommendation 1302, the Committee merely reiterated that it “appreciates the determined efforts of the Parliamentary Assembly,” but again did not deal with the specific recommendations and reinforced the commitment to moratoria.²⁵ The Committee stated:

[b]earing in mind that, at national level, parliaments and governments share responsibility regarding the abolition of the death penalty, the Committee of Ministers regards the present interim reply as part of an ongoing dialogue between the Parliamentary Assembly and the Committee of Ministers concerning this question.²⁶

The Committee was giving a nod to state sovereignty over the radical human rights boundaries proposed by the Assembly. It also confirmed support for “all other initiatives taken at the national level by governments and parliaments in favour of abolition of capital punishment,”²⁷ and that it:

considers that the process of monitoring compliance with commitments accepted by member states of the Council of Europe can contribute, in a spirit of dialogue and co-operation, to the process of putting an end to capital

²⁵ Interim Reply to Recommendation 1302 (1996), Abolition of the death penalty in Europe, Communication from the Committee of Ministers, Doc 7798, 15 April 1997, adopted 9 April 1997, 588th Meeting of the Minister’s Deputies.

²⁶ *ibid*, second unnumbered paragraph.

²⁷ *ibid*, point b.

punishment. It also considers that the Parliamentary Assembly has an important role to play in this regard.²⁸

Within this initial dialogue concerning the applications of new Member States, the Assembly recommended legislative action concerning abolition through *Protocol No. 6*, but the Committee attempted to preserve moratoria as the appropriate standard. Alastair Mowbray, the human rights scholar, has affirmed that the Assembly took a more “robust anti-death penalty stance.”²⁹ He further noted that the Committee wanted to focus on moratoria in an attempt to allow the states to adopt their own abolition processes as “the Committee of Ministers determined that the political imperative was the achievement of a moratorium on executions in all member states.”³⁰

The European Ministerial Conference on Human Rights held in Rome on 3-4 November 2000, to mark the fiftieth anniversary of the *Convention*, changed the legislative tide.³¹ The Conference adopted Resolution II and the section on the death penalty, *inter alia*, invited Member States to consider the possibility of the abolition of the death penalty in all circumstances, which would in effect make abolition a

²⁸ *ibid*, point c.

²⁹ Alastair Mowbray, ‘The European Convention on Human Rights: The Abolition of Capital Punishment and Recent Cases,’ *HRLR*, 2, 2, 2002, p. 311.

³⁰ *ibid*, p. 312.

³¹ For the draft documents see, Steering Committee for Human Rights, 49th Meeting, 3-6 October 2000, CDDH (2000) 025 Addendum, Strasbourg, 11 October 2000; and for the adopted text, Proceedings: *European Ministerial Conference on Human Rights and Commemorative Ceremony of the 50th Anniversary of the European Convention on Human Rights*, Rome, 3-4 November 2000.

condition of membership.³² This was a departure from the singular focus on moratoria as a political mechanism to achieve abolition. During the Foreign Ministers' "Declaration 'For a European Death Penalty-Free Area,'" the Committee of Ministers began specifically to advocate the need for ratification of *Protocol No. 6*, which would be in compliance with Resolution II.

However, the wording of the Draft Declaration was restricted as it stated that the Committee of Ministers was:

[d]eeply convinced that the abolition of the death penalty is an important contribution to respect for human dignity and human rights and that the signing and the ratification of Protocol No. 6 by all member states are therefore *highly advisable* (emphasis added).³³

Making ratification of *Protocol No. 6* a "highly advisable" position, as opposed to a "prerequisite for membership," was a tentative step in the Parliamentary Assembly's direction. But the subsequent text adopted included convoluted wording which did not simply state that Member States should ratify *Protocol No. 6*, but that:

³² *ibid*, Proceedings, Resolution II: B. Abolition of the death penalty in times of war and times of peace, para. 14(ii) "invites the Committee of Ministers to consider the feasibility of a new additional protocol to the Convention, which would exclude the possibility of maintaining the death penalty in respect of acts committed in time of war or imminent threat of war."

³³ Draft Declaration on the European Death Penalty-Free Area, CM(2000)163 (Restricted) 27 October 2000, 728th meeting, 30 October 2000, para 5.

[h]aving regard to Resolution [II] on Respect for Human Rights which *inter alia* requests that the member states ratify as soon as possible, if they have not yet done so, Protocol No. 6 and in the meantime, respect the moratoria on executions adopted by the European Ministerial Conference on Human Rights on the occasion of the 50th Anniversary of the European Convention on Human Rights³⁴

The Foreign Ministers relied upon the Resolution text, and did not propose a specific Committee of Minister's position. Again, recourse to moratoria is repeated and only a "request" for ratification of *Protocol No. 6* is given. What resulted was a form of legislative stalemate. But the Committee did give ground to the Assembly. The Committee was not opposing the Assembly's prerequisites for future Member States, but it did not explicitly endorse them either. As a result, the Committee's position of a moratorium can be seen as a minimal requirement, but the Assembly's position provided a higher threshold.

However, the Assembly was not deterred and it advanced its position in a radical manner. We now see below that in the expansion process the new countries did join the Council with the acceptance of the Committee's condition of the imposition of a moratorium, and also the vast majority accepted the Assembly's preconditions of signature and ratification of *Protocol No. 6*.

³⁴ Declaration "For a European Death Penalty-Free Area," adopted by the Committee of Ministers at its 107th Session, 9 November 2000, para 4.

7.2.2 The Expansion of the Council to Central and Eastern European States

It is a mark of the effectiveness of the Council's strategy against the death penalty that the vast majority of new Member States from Central and Eastern Europe removed the punishment from their laws, especially since many of the countries had previously imposed a large amount of executions.³⁵ In conjunction with setting prerequisites for membership, the Assembly strengthened its strategy by consulting the European Commission for Democracy through Law (more commonly known as the "Venice Commission") to remedy any municipal constitutional law questions regarding the adoption of the provisions for abolition.³⁶ This had the effect of making the transition to membership a less problematic exercise. The Council further promoted smooth change in the penal policies by enhancing the position of non-governmental organisations and civil society.³⁷ These two capacity building mechanisms contributed to the strengthening of the abolitionist discourse.

³⁵ See below for the examples of the Ukraine and Russia.

³⁶ The Venice Commission is the Council of Europe's advisory body on Member State constitutional matters and it was established in 1990 by Resolution (90) 6 *on a partial agreement establishing the European Commission for Democracy through Law*, adopted by the Committee of Ministers on 10 May 1990 at its 86th Session. The current functions of the Venice Commission can be found in Resolution (2002) 3 *revised statute of the European Commission for Democracy through Law*, adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies. See the Venice Commission's website,

http://www.venice.coe.int/site/main/presentation_E.asp?MenuL=E

³⁷ See the Council of Europe Conference of Nongovernmental Organisations website, at

<http://www.coe.int/T/E/NGO/public/>

Both the Assembly and the Committee monitored the compliance of the commitments by the new Member States.³⁸ Before joining, the majority of countries abolished the punishment with either a new Constitutional provision³⁹ or through Constitutional Court decisions.⁴⁰ Furthermore, as *Protocol No. 13* came into force in 2002, it was immediately relevant for the expansion process. The abolition of the death penalty in all circumstances was viewed as a natural consequence. Most of the joining countries had a fairly smooth route to formulating the penological change, but some did not and required help from the Parliamentary Assembly and the Venice Commission. These countries initiated a moratorium, but witnessed some legal and political difficulties which stalled ratification of *Protocol No. 6*, and then the transition to *Protocol No. 13*.

³⁸ *Capital Punishment: Information Submitted by States; Compliance with Member State's Commitments*, CM, Decl- AS/Inf [1999] 2, 26 April 1999.

³⁹ For instance, the Constitution of the Republic of Croatia, 1990, Article 21 states, "Every human being has the right to life. In the Republic of Croatia there shall be no capital punishment." The Constitution of the Republic of Macedonia, 1991, Article 10 states, "The human right to life is irrevocable. The death penalty shall not be imposed on any grounds whatsoever in the Republic of Macedonia."

⁴⁰ For instance, in 1990 the Hungarian Constitutional Court declared the death penalty to be unconstitutional in Ruling 23/1990 (X 31 AB), Judgment of 24 October 1990, Magyar Közlöny (Official Gazette) 31 October 1991, cited in Eva Pahur, 'The Abolition of the Death Penalty in Central and Eastern Europe: A Survey of Abolition Processes in former Communist Countries,' p. 86, in Centre for Capital Punishment Studies, *Occasional Papers*, vol. 2 August 2005. The Lithuanian Constitutional Court also declared the death penalty to be unconstitutional, see, *The Constitutional Court of the Republic of Lithuania: Ruling: On the compliance of the death penalty provided for by the sanction of Article 105 of the Republic of Lithuania Criminal Code within the Republic of Lithuania*, Vilnius, 9 December 1998, CDL(1999)013e-rev-restr, Venice Commission, Strasbourg, 26 April 1999.

For instance, the Albanian Constitutional Court considered *Convention* Article 2(1) and *Protocol No. 6* and held that the death penalty in peacetime was a violation of the Albanian Constitution, but that the punishment could be implemented in exceptional circumstances.⁴¹ Before Albania ratified *Protocol No. 6*, the Venice Commission investigated the possibility of the death penalty under Article 21 of the Albanian Constitution, which states, “[t]he life of the person is protected by law.”⁴² It argued that the “absolute lack of provision for exceptions to the protection of the right to life confirms that no exception was intended by the national legislator.”⁴³ Albania then ratified *Protocol No. 13* in 2007, removing the possibility of the death penalty in all circumstances. In another example, the Armenian Constitutional Court considered Article 17 of the Armenian Constitution, which states “the death penalty, until its abolition, may be prescribed by law for particular serious crimes, as an exceptional punishment.” The Court held that this was compatible with *Protocol No. 6*.⁴⁴ The Venice Commission can also be seen as contributing to Armenia

⁴¹ Case No. ALB-1999-3-008, Albanian Constitutional Court, 10 December 1999, cited in Bertrand Mathieu, *The Right to Life in Constitutional and International Case-Law*, (Strasbourg: Council of Europe Publishing, 2006), pp. 45-49.

⁴² See, Giorgio Malinverni and Hanna Suchocka, *Opinion on the Compatibility of the Death Penalty with the Constitution of Albania*, Strasbourg, 11 February 1999, CDL (1999) 001e-restr.

⁴³ Mr. J. Klucka, ‘Activities of the Venice Commission relating to the suppression of the death penalty,’ European Commission for Democracy through Law, CDL-JU (2002) 38, Strasbourg, 20 November 2002, p. 4.

⁴⁴ Case No. ARM-2003-2-2004, Armenian Constitutional Court, 15 July 2003, cited in Mathieu, *ibid*, pp. 49-50.

ratifying *Protocol No. 6* although it is still to ratify *Protocol No. 13*,⁴⁵ and the exception identified by the Constitutional Court still applies.

The abolition process within Central and Eastern Europe can be viewed as a combination of top-down and bottom-up policy formation. The initiatives of the Council go hand-in-hand with the acceptance of the policies by the Member States as has been witnessed with the signing and ratifications of *Protocol No. 6*⁴⁶ and *Protocol No. 13*.⁴⁷ Only Russia is yet to ratify *Protocol No. 6*, and it has not signed

⁴⁵ See, Report of the Venice Commission on the Revised Constitution of the Republic of Armenia on 7 July 2001, CDL-INF (2001) 114; Venice Commission, *Conclusions of the Meeting of the Working Group on Legislative Reforms to be Carried Out in the Republic of Armenia before the Entry into Force of the Revised Constitution*, 12 July 2002.

⁴⁶ The complete list of ratifications of *Protocol No. 6* by 16 April 2008 is: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom. Russia is the only Member State which has not ratified the protocol, it deposited its signature on 16 April 1997.

⁴⁷ The list of ratifications of *Protocol No. 13* as of 16 April 2008 is: Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Kingdom. The countries which have signed but yet to ratify are: Armenia, Azerbaijan, Latvia, Poland, Spain; Russia has not yet signed *Protocol No. 13*.

Protocol No. 13. As such the significance of protocols as international law has been considered by the Venice Commission when it stated in 1999:

[i]t can therefore be asserted, and with confidence, that the national and international dimensions of European law tend both independently and together towards the abolition of capital punishment. The evolution in this direction is clear and is becoming a cornerstone of European public order.⁴⁸

In addition Armenia, Azerbaijan, Latvia, Poland, Spain and Russia are yet to ratify *Protocol No. 13*. The expansion has not gone completely to plan as there has been, and continue to be, states which are resistant to the Council membership policies. However the Assembly has focused efforts on the specific cases where states have breached the agreement to initiate a moratorium and reintroduced executions.

Renate Wohlwend had been especially attuned to Member States who administered death sentences and executed people before and during membership. She identified that such monitoring of Member States is a responsibility the Assembly should undertake.⁴⁹ In 1996, the Assembly deplored the executions which were carried out

⁴⁸ Mr. Giorgio Malinverni and Mrs. Hanna Suchocka, *Opinion on the Compatibility of the Death Penalty with the Constitution of Albania*, adopted by the Commission at its 38th Plenary meeting, Venice, 22-23 March 1999, Strasbourg, 24 March 1999, CDL-INF(1999)004e, section 2.

⁴⁹ See the articles by Renate Wohlwend in the Council of Europe publications on the death penalty, *The Efforts of the Parliamentary Assembly of the Council of Europe*, pp. 55-67, in Council of Europe, *The Death Penalty: Abolition in Europe* (Strasbourg: Council of Europe Publishing, 1999); and *ibid*, *The Role of the Council of Europe's Parliamentary Assembly*, pp. 65-86, in Council of Europe, *The Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

in Latvia, Lithuania and the Ukraine.⁵⁰ Latvia and Lithuania abandoned the death penalty after the 1996 executions and both countries ratified *Protocol No. 6* in 1999.⁵¹ However, a more dramatic violation of a moratorium was witnessed in the Ukraine.

On the 9th November 1995, the Ukraine acceded to the Council⁵² and agreed to initiate a moratorium on executions and sign within one year *Protocol No. 6* and ratify it within three years. The Parliamentary Assembly interpreted it as violating its commitments when executions resumed that same year. Renate Wohlwend was “shocked to find that thirteen executions had taken place in the Ukraine and equally shocked by the secrecy surrounding the death penalty and executions in the country, as well as by the living conditions on death row.”⁵³

⁵⁰ Resolution 1097 (1996) *on the abolition of the death penalty in Europe*, text adopted by the Assembly on 28 June 1996 (24th sitting), para 2.

⁵¹ Resolution 1187 (1999) *Europe: a death penalty-free continent*, adopted by the Standing Committee, acting on behalf of the Assembly, on 26 May 1999, para 3.

⁵² The Ukraine was granted special guest status in 1992 and when their application was considered in 1995, the Council of Europe was aware of executions taking place in 1994 and 1995. When acceding to the Council of Europe, the Ukraine had agreed to sign and ratify in one year Protocol No. 6, but this was extended to three years in the event that a moratorium was in place to prevent execution up until ratification, see *Report on the abolition of the death penalty in Europe*, Doc. 7589, text adopted by the Assembly on 28 June 1996 (24th sitting) paras. 39, 43.

⁵³ Renate Wohlwend, above, fn. 49, (2004), p. 73. This “shock” was also stated in, *Honouring of commitments by Ukraine to introduce a moratorium on executions and abolish the death penalty*, Doc. 7974, 23 December 1997, Draft Resolution, para 1.

The executions were renounced by both the Assembly and human rights scholars within the Ukraine,⁵⁴ and the Assembly recalled Ukraine's commitments in the light of these executions.⁵⁵ But in an effort to restrict transparency of the capital judicial process, the Ukraine State Committee on Secrets and Technical Information, attempted to keep the information on executions away from the Council and nongovernmental organisations and declared that data regarding the administration of the death penalty was a state secret.⁵⁶

The Ukrainian Minister of Justice, Mrs. S. Stanik, sent a letter to the Council informing them that between 1995 and 1997 212 people had been executed.⁵⁷ When thirteen further executions were recorded for the period between 1 January 1997 and 11 March 1997, Renate Wohlwend stated "I feel I cannot trust the Ukrainian

⁵⁴ See, T. Andrusiak, *Ukrainian Thinkers against Capital Punishment*, UJHR 2, (1997) 105; O.

Pavlychenko, *Ukraine in the Council of Europe: Third Year of Membership*, UJHR 2 (1997) 114.

⁵⁵ See, Opinion No. 190 (1995) *on the application by Ukraine for membership of the Council of Europe*, 26th September 1995, para 12(ii), "The Parliamentary Assembly notes that the Ukraine shares its interpretation of commitments entered into...and intends to sign within one year and ratify within three years from the time of accession Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of the death penalty, and to put into place, with immediate effect from the day of accession, a moratorium on executions."

⁵⁶ See, *Secret Mass Executions in Ukraine Called "Barbaric,"* Amnesty International Press Release, 3 December 1996, EUR 50/16/96.

⁵⁷ Information given in a letter dated 31 March 1998, from Mrs S. Stanik, the Minister of Justice of the Ukraine to Mrs. Leni Ficher, (then) President of the Parliamentary Assembly of the Council of Europe, included as Appendix 1., in *Honouring of the commitment entered into by Ukraine upon accession to the Council of Europe to put into place a moratorium of the death penalty*, Report, Doc. 7745, text adopted by the Assembly on 28 January 1997.

authorities any more,” and that “it is not enough to issue another warning; this would endanger the Assembly’s credibility.”⁵⁸ Furthermore, the Assembly recommended that the Committee suspend the Ukraine from the Council.⁵⁹ This persistent pressure was emphasised in a further Resolution which warned the Ukraine that the Assembly will “take all necessary steps to ensure compliance with commitments entered into.”⁶⁰ Again the Committee displayed a distancing from the conflict between the Ukraine and the Assembly, and provided a less radical approach, continuing to ensure constructive dialogue with the Ukrainian government.⁶¹

⁵⁸ *Honouring of the commitments by Ukraine to introduce a moratorium on executions and abolish the death penalty*, Doc. 7974, text adopted by the Assembly on 23 December 1997.

⁵⁹ In Resolution 1194 (1999) *Honouring of obligations and commitments by Ukraine*, text adopted by the Assembly on 24 June 1999 (23rd sitting), the Parliamentary Assembly noted that it shall, para 1.i. “proceed to the annulment of the credentials of the Ukrainian parliamentary delegation in accordance with Rule 6 of its Rules of Procedure, until these commitments have been fully complied with,” and in para 1.ii. “recommend that the Committee of Ministers proceed to suspend Ukraine from its right of representation, in conformity with Article 8 of the Statute of the Council of Europe.”

⁶⁰ Resolution 1112 (1997) *on the honouring of the commitment entered into by Ukraine upon accession to the Council of Europe to put into place a moratorium on executions*, text adopted by the Assembly on 29 January 1997 (5th sitting).

⁶¹ See, *Ukraine: Note on Council of Europe action towards abolition of the death penalty*, prepared by the Directorate of Legal Affairs, GR-EDS(98)26, 9 April 1998. Also Sangmin Bae argued that in “light of Ukraine’s ongoing failure to meet its obligations, the Committee of Ministers of the Council of Europe took a different approach from the PACE. Whereas the PACE did not hesitate to issue public warnings and criticisms, the Committee of Ministers took a less aggressive approach, maintaining a continuous dialogue at all levels,” *When the State No Longer Kills: International Human Rights Norms and Abolition of the Death Penalty*, (New York: State University of New York Press, 2007), p. 34.

Even with the executions taking place, which the Committee denounced, it acted as a buffer to the exertions by the Parliamentary Assembly, and ensured that the Ukraine was kept in a dialogue with the Council and not excluded from the process. This was perhaps, as Sangmin Bae argued, because the Ukrainian situation was seen as a “rare case.”⁶² But even so the Assembly intensified its efforts.

In 1996 a seminar was held in Kyiv to bring together the Ukrainian authorities, Ukrainian human rights advocates and the Council of Europe.⁶³ One of the main strategies was to educate the authorities on the lack of deterrent effect of the death penalty, as its special deterrent quality was erroneously presumed by the Ukrainian authorities.⁶⁴ Roger Hood stated at the seminar, “[i]t is futile for...states to retain the death penalty on the grounds that it is justified as a deterrent measure for unique effectiveness.”⁶⁵

The Venice Commission were consulted by the Assembly and the Commission stated that the “question of the death penalty in Ukraine should...be examined in the

⁶² *ibid*, p. 32.

⁶³ *Committee on Legal Affairs and Human Rights: The Abolition of the Death Penalty, Report, on the Seminar on the Abolition of the Death Penalty, held in Kyiv on 28 and 29 November 1996, Strasbourg, 17 January 1997, AS/Jur (1996) 70.*

⁶⁴ Two speakers focused on this point; see, *ibid*, Roger Hood, *Capital Punishment, Deterrence and Crime Rates*, and Peter Hodgkinson, *Misconceptions on the Death Penalty: Capital Punishment and Public Opinion*, papers presented at *Seminar on the Death Penalty*, included as annex to the Report on the Seminar.

⁶⁵ *ibid*, p. 6.

light of the growing tendency in international law to proscribe the death penalty.”⁶⁶ The Assembly said that “it was willing to grant the Ukraine all the assistance within its means,”⁶⁷ but confirmed that the Ukraine had failed to meet its deadline for ratification of *Protocol No. 6*.⁶⁸ Renate Wohlwend argued that it was not asking too much too quickly to require the Ukraine to fulfil obligations freely entered into with the Council. Even though the post-Communist country had rising crime rates other post-Communist countries with similar crime rates had managed to sustain a moratorium.⁶⁹

Furthermore, the Parliamentary Assembly passed a Resolution⁷⁰ which provided details of the human rights violations to various international organisations.⁷¹ Then

⁶⁶ Venice Commission, *Opinion of the Venice Commission on the Constitutional aspects of the Death Penalty in Ukraine*, adopted by the Commission at its 33rd Plenary Meeting, (Venice, 12-13 December 1997) CDL-INF (1998) 001e-rev, Strasbourg, 17 April 1998; Mr. Gérard Batliner, Comments on the Constitutional Issues which Might be Raised by the Death Penalty in Ukraine in the Light of the Constitution of 28 June 1996, Venice Commission, Strasbourg, 28 May 1997, CDL(1997)015e-restr.

⁶⁷ Resolution 1145 (1998) *Executions in Ukraine*, text adopted by the Assembly on 27 January 1998 (2nd sitting), para 2.

⁶⁸ See, Recommendation 1416 (1999) *honouring of obligations and commitments by Ukraine*, text adopted by the Assembly on 24 June 1999 (23rd sitting); and Resolution 1194 (1999) *honouring of obligations and commitments by Ukraine*, text adopted by the Assembly on 24 June 1999 (23rd sitting).

⁶⁹ See, Renate Wohlwend, above, fn. 49, pp. 55-68.

⁷⁰ Resolution 1179 (1999) *honouring of obligations and commitments by Ukraine*, text adopted by the Assembly on 27 January 1999 (5th sitting).

⁷¹ Including the European Union organs of the European Parliament and the European Commission, the Organisation for Security and Co-operation in Europe (OSCE), the European Bank for

in December 1999 the death penalty was officially declared unconstitutional by the Constitutional Court of the Ukraine.⁷² Then the Ukrainian Parliament officially abolished the death penalty on 22 February 2000. *Protocol No. 6* was ratified on 4 April 2000.⁷³

Wohlwend described the Ukraine as “one of the Council’s success stories.”⁷⁴ It is evident that the Council’s process of political dialogue was a decisive factor in the Ukraine adopting the human rights principles and recommitting itself to the conditions of membership. However, the situation in Russia, Poland and within break-away separatist territories is more complicated, and we now turn to consider these situations below.

The Russian Federation is a source of frustration for the Parliamentary Assembly.⁷⁵ Russia’s application for membership to the Council of Europe considered the position of the death penalty in the country and it was noted in 1993 that 157 death

Reconstruction and Development the World Bank, the International Monetary Fund, the Congress of Local and Regional Authorities of Europe and the Social Development Fund.

⁷² See above, fn. 66.

⁷³ Wohlwend, above fn. 49, (2004), p. 74; See, Bertrand Mathieu, *The Right to Life*, (Strasbourg: Council of Europe Press, 2006), p 54, translation of section of judgment, Constitutional Court Case, 29-12-1999.

⁷⁴ *ibid*, p. 74.

⁷⁵ Russia’s original application was suspended in January 1995 following Russia’s intervention in Chechnya, but was reopened on 26 September 1995 with Resolution 1065 (1995); see also, Bureau of the Assembly, *Report on the Conformity of the Legal Order of the Russian Federation with Council of Europe Standards*, Strasbourg, (Parliamentary Assembly) 28 September 1994, AS/Bur/Russia (1994), para 7.

sentences were handed down and 3 people were executed, and 123 pardoned. In 1994, 160 death sentences were handed down, 10 people were executed and 151 were pardoned.⁷⁶ Between 1995 and 1996, the number of executions rose to an estimate of 139.⁷⁷ However, there was a discrepancy in the information given to the Assembly by the Russian authorities as to the actual execution total. Anatoly Pristavkin, a former Chairman of the Presidential Pardons Commission of Russia, and adviser to President Vladimir Putin, speaking at a seminar on the abolition of the death penalty in Kyiv, Ukraine, in November 1996, stated that from Russia's accession in February 1996 that over a hundred people were executed.⁷⁸ Mrs. Leni Fischer was informed by a Russian official that 96 executions had taken place.⁷⁹

When Russia acceded to the Council in 1996, it initiated a moratorium on executions. These executions were in violation of its commitments. Bill Bowring, an expert on human rights in Russia, noted a further discrepancy between the then Justice Minister Konstantin Kovalyov claiming that all death sentences were commuted, with conflicting reports that executions were being administered.⁸⁰ The

⁷⁶ *Russia's application for membership of the Council of Europe*, Doc. 7463, 18 January 1996.

⁷⁷ This figure was provided by Anatoly Pristavkin, *A Vast Place of Execution – The Death Penalty in Russia*, p. 133, in Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Publishing, 1999).

⁷⁸ *ibid.*

⁷⁹ See, *Honouring of the commitment entered into by Russia upon accession to the Council of Europe to put into place a moratorium on execution of the death penalty*, Report, Doc. 7746, 28 January 1997, para. II.

⁸⁰ Bill Bowring, 'Russia's accession to the Council of Europe and human rights: compliance or cross-purposes?' *E.H.R.L.R.* 1997, 6, 628-643, p. 642.

1993 Russian Constitution, and the Criminal Code, which came into force on 1 January 1997 allows for the punishment.⁸¹ However, in February 1999 the Russian Federal Constitutional Court held that in capital trials, the person(s) charged must receive a trial by jury under Article 20(2) of the Constitution.⁸² Bowring noted that trial by jury was only available in nine of the eighty-nine regions and so this provided a direct procedural bar to capital trials being carried out. As such this decision enabled the Constitution's equal protection clause in Article 19, the right to life in Article 20 (2), and the legal protection of rights under Article 46(1) to be initiated.⁸³

However, in 1999 the Council and the Clemency Commission of the Russian Presidential Administration held a conference in Moscow on the death penalty, and it was observed that the "opinion has been primed towards abolition by the President's Administration."⁸⁴ Hans Christian Krüger described the conference as "ground breaking" because it was "almost surely the first forum in the Russian

⁸¹ Russian Constitution of 1993, Article 20, guarantees the right to life, but section 2 provides that, "capital punishment until its complete abolition may be established by federal law as an exclusive form of punishment for particularly grave crimes against life, and the accused shall be granted the right to have his case examined by a court with the participation of a jury," cited in Bill Bowring, 'Russia's accession to the Council of Europe and human rights: four years on,' *E.H.R.L.R.* 2000, 4, 362-379, p. 369.

⁸² Decision of February 2, 1999, No. 3-P, *Rossiskaya Gazeta*, February 10, 1999, see, Venice Commission, Bulletin on Constitutional Case Law, 1999-1, pp. 96-98.

⁸³ Bowring, above, fn. 81, p. 371.

⁸⁴ *Conference on Abolition of the Death Penalty, Moscow 3-4 June 1999*, Mission Report by Mr. Pierre-Henri Imbert, Director of Human Rights, Human Rights Directorate, Mission Order No. DP310/1999/ddh, p. 1.

Federation in which government officials opposed to capital punishment were in the majority.”⁸⁵ Bowring argued that concerning the ending of the death penalty in Russia in 1997, the “only hope for a moratorium is through the activities of the Committee on Clemency.”⁸⁶

Even though there has been *de facto* abolition, Secretary Generals of the Council of Europe have called upon Russia to ratify Protocol No. 6, Walter Schwimmer called for ratification in 2003,⁸⁷ and Terry Davis made a similar plea in October 2005.⁸⁸ Anatoly Pristavkin appears to confirm that Russia is listening to the Council of Europe’s pleas.⁸⁹ President Putin has advanced abolitionist arguments in the State Duma (the Russian lower house of parliament), and has argued for Russia to maintain a moratorium but to also ratify *Protocol No. 6*. However, the State Duma has not obliged the Kremlin, as in 2002 it adopted a non-binding resolution against the abolition of the death penalty.⁹⁰ This resolution prevented Russia from ratifying *Protocol No. 6*. The State Duma pointed to public support for the death penalty and so it was “premature” for it to change the capital laws.⁹¹

⁸⁵ Speech presented by Hans Christian Krüger at the ‘Clemency Conference in the Russian Federation: Launching a Three Year Campaign to Humanise Penal Policy,’ Veliky Novgorod, 25-26 October 2000, p. 1.

⁸⁶ *ibid.*

⁸⁷ *Walter Schwimmer in talks with Russia Justice Minister Yury Chayka*, 18 December, 2003, www.coe.int/NewsSearch.

⁸⁸ *Abolish the Death Penalty because of Belsan*, 21 October 2005, www.con.int/NewsSearch

⁸⁹ Anatoly Pristavkin, above, fn. 77, p. 203.

⁹⁰ ‘Russian Parliament Backs Death Penalty,’ BBC News, 15 February, 2002, <http://news.bbc.ac.uk/1/hi/world/europe/1823556.stm>.

⁹¹ *ibid.*

However, President Putin has spoken strongly against lifting the moratorium,⁹² and even with the Duma's resistance to the President's abolitionist calls, it appears that the moratorium is strong for the moment.⁹³ The political arguments against the imposition of the death penalty were severely tested in the much publicised 2006 trial of Nur-Pashi Kulayev for his part in the Beslan school siege in 2004 where after a three day hostage situation, 330 were killed.⁹⁴ Kulayev was found guilty and Judge Tamerlan Aguzarov stated that the defendant deserved the death penalty "but is sentenced to life in prison because a moratorium is in place."⁹⁵ There was strong public support for Kulayev's execution but the court adhered to the President's order.

Furthermore, the Russian government stated in 1998 that "Russia shares the international community's growing aspiration to universally abolish the death

⁹² See, 'Putin opposes return to death penalty,' BBC News, 9 July 2001, <http://news.bbc.co.uk/1/hi/world/europe/1426443.stm>; 'Putin speaks out against death penalty, 13 March, 2002, <http://news.bbc.co.uk/1/hi/world/europe/1870916.stm>

⁹³ However, we cannot be completely confident in Russia's observance of human rights. Bill Bowring has highlighted Russia's human rights violations, its refusal to ratify *Protocol No. 14*, and that a large amount of the Court's caseload involves applications against Russia, see Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics*, (Abington: Routledge-Cavendish, 2008), pp. 97, 184-6; see also Bowring, above, fn. 80 and 81.

⁹⁴ 'Beslan attacker jailed for life,' BBC News, 26 May, 2006, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/5018928.stm>.

⁹⁵ *ibid.*

penalty.”⁹⁶ Renate Wolhwend agreed in her speech to the 3rd World Congress against the Death Penalty in Paris in 2007, that the “signals received from Moscow...show that complete abolition should be only a matter of time.”⁹⁷

But there is ambivalence present concerning the purported inevitability of Russia ratifying *Protocol No. 6* and take the next step towards abolition. In 2005, Alvaro Gil-Robles, Commissioner for Human Rights, stated in his report on his visits to the Russian Federation that it’s “failure to honour its undertaking is a source of grave concern.”⁹⁸ Part of his concern was based on the arguments within the political elites in favour of its reintroduction. He argued against this and repeated “with insistence that the abolition of the death penalty is essential to the establishment of a genuine modern democracy, which fully respects fundamental freedoms and rights.”⁹⁹ In October 2007 the Committee:

reiterated their strong support and urgent call on the Russian Federation, as the only member state which has not yet abolished the death penalty, to take

⁹⁶ Statement made by the Russian minister, A.F. Petrachkov, in, *Hands Off Cain, Moratorium 2000: Abolition of the Death Penalty at the 54th UN Commission on Human Rights*, (Rome: Associazione Mariateresa Di Lascia, 1998).

⁹⁷ Renate Wohlwend, ‘Full text of Speech delivered by Renate Wohlwend (Liechtenstein/EPP/CD) on the occasion of the 3rd World Congress against the Death Penalty’ (Paris, 1-3 February 2007), included as appendix in, *Promotion by Council of Europe member states of an international moratorium on the death penalty*, Doc. 11303, 11 June 2007.

⁹⁸ *Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visits to the Russian Federation, 15 to 30 July 2004 and 19 to 29 September 2004, for the attention of the Committee of Ministers and the Parliamentary Assembly*, Strasbourg, 20 April 2005, CommDH9(2005)2, para 90.

⁹⁹ *ibid*, para 91.

without delay all the necessary steps to transform the existing moratorium on executions into *de jure* abolition of the death penalty and to ratify Protocol No. 6.¹⁰⁰

And this was because the Committee recalled that it “has repeatedly urged the Russian Federation to ratify *Protocol No. 6*, thus making the Council of Europe a *de jure* death penalty free zone, and will continue to follow progress towards ratification.”¹⁰¹ The essential issue here is that the Council wants Russia to adopt *Protocol No. 6* so that it will place a legal mandate over the current political moratorium.

The Council has also displayed concern at some countries calling for the reintroduction of the death penalty even after *Protocol No. 6* has been ratified. The possible reinstating of the death penalty in Central and Eastern Europe has been of continual concern. Poland considered reintroduction in 2004-5,¹⁰² when the Law and Justice Party made the adoption of the death penalty one of the main points of

¹⁰⁰ *Abolition of the death penalty in all member states of the Council of Europe*,

CM/Del/Dec(2007)985/4.4 and CM/Del/Dec(2007)993/4.1 adopted at the 1009th meeting of the Minister’s Deputies, 24 October 2007, para 1.

¹⁰¹ *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, *Parliamentary Assembly Recommendation 1760* (2006), Reply adopted by the Committee of Ministers on 31 January 2007, at the 985th meeting of the Ministers’ Deputies, CM/AS(2007)Rec1760 final, 2 February 2007, para 2.

¹⁰² Aleksandra Gliszczyńska, Katarzyna Sękowska, and Roman Wieruszewski, ‘The Abolition of the Death Penalty in Poland,’ pp. 19-26, in ODIHR, *The Death Penalty in the OSCE Area: Background Paper 2006*, (Warsaw: OSCE, 2006).

its election platform. Agata Fijalkowski stated that both Polish society and the political elites support the application of the death penalty as a “notion of a strong state.”¹⁰³

Such support for the death penalty was revealed on 22 October 2004 when the lower house of the Polish Parliament rejected the proposal to reintroduce the punishment by a vote of 194 in favour and 198 against, with 14 abstentions.¹⁰⁴ Renate Wohlwend commented, “[t]he result hardly gives cause for rejoicing; there is, quite the contrary, every reason to be disturbed, even scandalised, by such a result. After all, 194 MPs were willing to vote for the restoration of the death penalty in Poland!”¹⁰⁵ Wohlwend noted in 2007 that the political challenge to reintroduce the death penalty was “dropped very quickly after it became clear what the consequences of such a move would be for their country’s standing in Europe.”¹⁰⁶

There are also some separatist territories within Europe, which are not officially recognised internationally and are not subject to international treaties. Abkhazia, Transnistria, and South Ossetia, have retained the death penalty as an appropriate

¹⁰³ Agata Fijalkowski, ‘Capital Punishment in Poland: An Aspect of the “Cultural Life” Death Penalty Discourse,’ p. 162, in Austin Sarat and Christian Boulanger, (eds) *The Cultural Lives of Capital Punishment: Comparative Perspectives*, (Stanford: Stanford University Press, 2005).

¹⁰⁴ See, *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, Doc. 10911, 21 April 2006; Recommendation 1760 (2006), *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, 28th June 2006.

¹⁰⁵ *ibid.*

¹⁰⁶ Wohlwend, above, fn. 97.

punishment in both peacetime and wartime.¹⁰⁷ These break-away states are still heavily influenced by Russian and Georgian legislation, with South Ossetia making Russian law applicable within its territory in 1992, and Abkhazia and Transnistria, initiating a moratorium on executions although death sentences are still applied.¹⁰⁸ Transnistria had retained the death penalty following its split from Moldova. The Parliamentary Assembly adopted a resolution in 2006 calling for the commutation of all death sentences in all the separatist states.¹⁰⁹

Belarus is the only mainland European country which currently imposes executions and is also the only European state that is not a member of the Council of Europe. Elisabetta Zamparutti and Anna Zammit stated that “[i]n Europe the only blemish on the otherwise completely death penalty free zone is Belarus, where 5 people were put to death in 2004.”¹¹⁰ The statistics on the death penalty and executions in Belarus are a state secret, but what is known is that Belarus carried out four executions in 2004, two executions in 2005, but the actual figures are thought to be higher.¹¹¹ In Resolution 1560, the Parliamentary Assembly noted that executions

¹⁰⁷ Rick Fawn, ‘Death Penalty as Democratization: Is the Council of Europe Hanging Itself?’

Democratization, vol. 8, No. 2 (Summer, 2001), pp. 75-76.

¹⁰⁸ *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, Doc. 10911, 21 April 2006.

¹⁰⁹ Recommendation 1760 (2006), *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, text adopted by the Assembly on 28th June 2006 (20th sitting).

¹¹⁰ Elisabetta Zamparutti and Anna Zammit, *Hands Off Cain: The Death Penalty Worldwide: 2005 Report*, (Rome: Associazione Mariateresa Di Lascia, 1998), p. 10.

¹¹¹ *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, Doc. 10911, 21 April 2006.

were still being carried out in Belarus,¹¹² and further executions have been reported in the early part of 2008.¹¹³ Belarus has been described as the “sad exception.”¹¹⁴ The imposition of the punishment is one of the factors which prevents membership of the Council.

Western Europe has not been immune against strong political calls for reintroduction either. The Parliamentary Assembly was particularly disturbed by a French National Assembly debate on 8 April 2004 for the reintroduction of the death penalty for terrorist offences.¹¹⁵ This was a serious challenge to the current removal of the death penalty by a leading Council member. In arguing against the French National Assembly “proposition de loi,” members of the Parliamentary Assembly issued a Written Declaration which stated that the devastating consequences of France bringing the death penalty back would be, “[o]nce one exception is admitted, the same hollow arguments can be rephrased with increased confidence in calling for further exceptions.”¹¹⁶

¹¹² Resolution 1560 (2007) *Promotion by Council of Europe member states of an international moratorium on the death penalty*, text adopted by the Assembly on 26th June 2007 (22nd sitting).

See also: *Recent executions in Japan and Belarus: Statement of Ján Kubiš, Chairman of the Committee of Ministers of the Council of Europe*, Press Release, Strasbourg, 12.12.2007.

¹¹³ *Recent executions in Belarus: Statement by Ján Kubiš, Chairman of the Committee of Ministers*, Press Release, 13.02.2008; *Lluís Maria de Puig: ‘Belarus has one again opted for Barbarism rather than justice,’* Press Release, Strasbourg, 06.02.2008; *PACE rapporteur Andrea Rigoni condemns executions in Belarus*, Press Release, Strasbourg, 07.02.2008.

¹¹⁴ Wohlwend, above, fn. 97.

¹¹⁵ *Recent initiative in France to reintroduce the death penalty for the perpetrators of terrorist acts*, Doc. 10211, 17 June 2004.

¹¹⁶ *ibid.*

The possibility of a domino-effect for the reintroduction of the death penalty was clearly a concern. The symbolism of a country such as France bringing the punishment back would have severely damaged the credibility of the human rights discourse. However the Bill was not passed. The Assembly's voice again contributed to the maintenance of the anti-death penalty discourse.

From such stalwart promotion within the Council Member States, we now consider the furtherance of the human rights arguments on a global scale. The legal anthropologist, Evi Girling, has argued that all people on death row around the world have become "significant" to the Council and that the "vocal stance against the death penalty fits in with its pursuit of an international role as promoter of norms."¹¹⁷ It is to this worldwide view that we now turn. It will be argued in the section below that this abolitionist vision outside Council borders has contributed to the promotion of the abolitionist goal of worldwide renunciation of the punishment.

7.3 Part Two: The Strategy Against the Death Penalty and Third Countries

7.3.1 The Restriction of the Death Penalty in Council of Europe Observer States

¹¹⁷ Evi Girling, *European Identity and the Mission Against the Death Penalty*, p. 119, in Austin Sarat and Christian Boulanger (ed) *The Cultural Lives of Capital Punishment: Comparative Perspectives*, (Stanford: Stanford University Press, 2005).

We first consider the issue of the Council of Europe Observer States. The Council currently has five observer states, which are, Canada, Japan, Mexico, Vatican City State, and the United States of America. The observer states which impose the death penalty are Japan and the United States, and this is a source of concern for the Council. The Statutory Resolution on observer status mandates that:

[a]ny state willing to accept the principles of democracy, the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and wishing to co-operate with the Council of Europe may be granted by the Committee of Ministers, after consulting the Parliamentary Assembly, observer status with the Organisation.¹¹⁸

This Statutory Resolution has been interpreted by the Assembly to prohibit the application of the death penalty in observer states of the Council.¹¹⁹ Having observer states that apply the death penalty is a difficult political and legal conundrum for the Council, and it was created by the fact that observer status was granted to retentionist countries in 1996 before the Assembly's requirement for Member States to ratify *Protocol No. 6* gathered momentum. No universal position of abolition existed within Europe at that time and so Japan and the United States were accepted. However, no retentionist countries will be given observer status in

¹¹⁸ Statutory Resolution (93) 26, adopted 14 May 1993, para 1.

¹¹⁹ *Abolition of the death penalty in Council of Europe observer states*, Doc. 9115, 7 June 2001; Recommendation 1627 (2003) *Abolition of the death penalty in Council of Europe observer states*, text adopted by the Assembly on 1 October 2003 (30th sitting); and Resolution 1349 (2003); *Abolition of the death penalty in Council of Europe observer states*, text adopted by the Assembly on 1 October 2003 (30th sitting).

the future. For the status to be granted, at a minimum *de facto* abolition must be secured and *de jure* will be preferred.¹²⁰

The Council has condemned the capital judicial systems and executions that have taken place in the United States and Japan.¹²¹ But their observer status has not been revoked primarily because the Council wants to continue a dialogue in an attempt to persuade the two countries to initiate a moratorium as part of a process of abolition. In a 2001 Report the Assembly “deeply deplore[d]” the death penalty systems of Japan and the United States. It called into question their continued observer status should there have been no “significant progress in the implementation of this Resolution [being] made by 1 January 2003.”¹²²

In fact no “significant progress” had been made by that date in either country and instead of revocation, the Assembly intensified its “dialogue” through

¹²⁰ *ibid*, Doc. 9115, Part I, para 11.

¹²¹ See, *The Council of Europe, a death penalty free area*, http://www.coe.int/T/E/Com/Files/Themes/Death-Penalty/e_briefing.asp. Updated in 2008. Indeed, the United States and Japan have been juxtaposed by death penalty scholars in comparative analysis of their capital judicial systems. See for example, Daniel H. Foote, ‘The Door that Never Opens? Capital Punishment and Post-Conviction Review of Death Sentences in the United States and Japan,’ 19 *Brooklyn J. of Int’l L.* (2003), pp. 367-521; David T. Johnson, *The Death Penalty in Japan: Secrecy, Silence, and Salience*, pp. 251-273, in Austin Sarat and Christian Boulanger (ed), *The Cultural Lives of Capital Punishment: Comparative Perspectives*, (Stanford: Stanford University Press, 2005).

¹²² Resolution 1253 (2001) *abolition of the death penalty in Council of Europe observer states*, text adopted by the Assembly on 25 June 2001 (17th sitting), Part I, para 10.

communications and seminars in both countries.¹²³ The Assembly is ensuring that the United States and Japan are kept *within* so that a transparent gaze into their criminal justice systems can be maintained. A political and legal compromise is being facilitated which allows sensitive diplomacy.

David Johnson, a scholar on the death penalty in Japan, believes that there is “public apathy” towards the abolition of the death penalty and that this sentiment “serves the interest in avoiding scrutiny and opposition.”¹²⁴ The Japanese judicial system has ensured that executions are kept secret, and Johnson has stated that “[s]ilence, secrecy, passivity, and public opinion: these facts may suggest that the death penalty will not disappear from Japan anytime soon.”¹²⁵ Yoshihiro Yasuda, a Japanese lawyer and activist, is in agreement when he states “there is little possibility of improvement [through abolition] in the near future.”¹²⁶

On 12 February 2007, a cross-party group of Japanese MPs submitted a proposal to the Japanese Diet for a moratorium on executions,¹²⁷ but in December 2007¹²⁸ and

¹²³ See Wohlgend, above, fn. 49; Robert Badinter argued that in the dialogue with USA and Japan, Europe must adopt an “educational role,” see *Preface – Moving Towards Universal Abolition of the Death Penalty*, p. 9, in Council of Europe, *Death Penalty – Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

¹²⁴ Johnson, above, fn. 121, p. 254.

¹²⁵ *ibid*, p. 265.

¹²⁶ Yoshihiro Yasuda, ‘The death penalty in Japan,’ p. 231, in Council of Europe, *Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

¹²⁷ *PACE President welcomes Japanese MPs proposal to suspend executions*, Press Release, Strasbourg, 12.02.2007.

on 10 April 2008, the Japanese government still carried out executions in secret.¹²⁹ Lluís Maria de Puig, the President of the Council of Europe Parliamentary Assembly stated:

I reiterate the Assembly's appeal to Japan – as a state holding observer status with the Council of Europe – to place a moratorium on executions. The Assembly has in the past worked with the Japanese Diet to help bring this about, and is willing to do so again.¹³⁰

Johnson identifies an interesting factor in state relationships and emulation of state activity outside of Europe, which may lead to Japan abolishing the death penalty when he stated that a:

vital sign of change will be visible if South Korea, which has not executed anyone for more than seven years, abolished the death penalty. Some Japanese abolitionists believe that executives in the Liberal Democratic Party will not stand idly by if the neighbour that Japan once colonized abolishes first; that would be too much of a blow to their self-image as leaders of the premier regime in Asia....Although South Korea is one country Japan could emulate, if the United States abolishes first the effect would be even more powerful...In

¹²⁸ *Recent executions in Japan and Belarus: Statement of Ján Kubiš, Chairman of the Committee of Ministers of the Council of Europe*, Press Release, Strasbourg, 12.12.2007.

¹²⁹ *PACE President deplores secret, unannounced executions in Japan*, Press Release, Strasbourg, 10.04.2008.

¹³⁰ *ibid.*

any event, when Japan abolishes capital punishment it will probably do so as ‘a follower.’¹³¹

Both Japan and the United States are reluctant to allow the Council to export its human rights discourse on the death penalty into their countries. It appears that the Parliamentary Assembly is powerless to call both countries to abolition. All it can do is threaten to suspend their observer status.¹³² The continual exercise of state sovereignty by the United States (which is considered in more detail below) and Japan against the Parliamentary Assembly, has left the Council weighing the costs and benefits of having the two countries as allies through observer status. So far the human rights factors have not overridden the benefit of a relationship with the two countries.

The dialogue between the Assembly and Committee, as detailed in Chapters Five and Six above, which concerned the differences of opinion of the amendment of Article 2(1) and the extent to which Article 3 can restrict the death penalty, is now seen with relation to observer states. The Assembly has continually urged the Committee of Ministers to be more radical with the reprimand of observer states which impose the death penalty, but the Committee has been reluctant to adhere to the Assembly’s recommendations.

¹³¹ Johnson, above, fn. 121, p. 266.

¹³² See, Recommendation 1760 (2006) *Position of the Parliamentary Assembly as regards the Council of Europe member and observer States which have not abolished the death penalty*, text adopted by the Assembly on 28th June 2006 (20th sitting); *Position of the Parliamentary Assembly as regards the Council of Europe member and observer countries which have not abolished the death penalty*, Doc. 10152, 26 April 2004.

In January 2008 the Assembly adopted a detailed and pointed recommendation to the Committee of Ministers to call on Japan and the United States to initiate moratoriums on the death penalty by the end of 2008.¹³³ The Recommendation called on the Committee of Ministers to:

intensify its political dialogue with Japan and the United States, to urge both countries to finally place an immediate moratorium on executions, to abolish the death penalty as soon as possible, and to present to the Assembly by the end of 2008 a detailed account of its contacts with these countries.¹³⁴

Significantly, this Recommendation also called for the amendment of Statutory Resolution (93) 26,¹³⁵ and for the Committee to explore with the existing observer states their “readiness to subscribe voluntarily to any changes made to the statutory resolution.”¹³⁶ It also called for a new labelling mechanism called “new designations” which would appear to distinguish between the observer states which

¹³³ Recommendation 1827 (2008) *The Council of Europe and its observer states: the current situation and a way forward*, text adopted by the Assembly on 23 January 2008 (6th Sitting); affirming the provisions under Resolution 1600 (2008) *on the Council of Europe and its observer states – the current situation and the way forward*, text adopted by the Assembly on 23 January 2008 (6th sitting).

¹³⁴ *ibid*, Recommendation 1827 (2008) para 2.2.

¹³⁵ *ibid*, para 2.4.

¹³⁶ *ibid*, para 2.5.

apply the death penalty and those which do not.¹³⁷ We are yet to see what the Committee's response will be, but it is expected that it will repeat its call for dialogue and not suspend the two countries.

What the relationship of the Council with Japan and the United States demonstrates is that it is much more difficult for the human rights discourse to penetrate state sovereignty when the states are not a full Member State. But the Council will not back down. It has continually reminded the two countries of its interpretation of human rights and it publicises the executions by these countries as violations of human rights.

This specific international dimension of the Council's discourse against the death penalty, reveals that the Council is confident in what it has achieved within its own region, and that it now wants to export the abolitionist agenda internationally. We now consider how the Council has furthered its global focus by partnering the EU and the OSCE in their international initiatives.

7.4 Part Three: The Internationalisation of the Council's Discourse

7.4.1 The Support of the European Union Initiatives

¹³⁷ *ibid*, see paras 2.6-2.6.2. The distinguishing of states through "new designations" determines those states which obtained observer status through no formal arrangements or under the current Statutory Resolution, and those states which could be granted observer status after possible amendment. It would be expected that those which fall under the later category would not be willing to impose the death penalty.

The Council now seeks to adopt a more international focus to advance abolition globally. The Committee on Legal Affairs and Human Rights welcomed the Italian and EU initiative in the United Nations General Assembly for a worldwide moratorium on the death penalty,¹³⁸ and the Parliamentary Assembly called on “all member and observer states of the Council of Europe to actively support the Italian moratorium initiative in the UN General Assembly and to make the best use of their influence in order to convince countries that are still on the sidelines to join in.”¹³⁹

The Committee of Ministers also discussed the issue of co-operation between the Council of Europe and the UN in the draft United Nations Resolution for a moratorium on the death penalty.¹⁴⁰ The Committee made the decision to invite the Slovak Chairmanship of the Committee of Ministers to support on behalf of the Council the UN Resolution, and it also invited Member States to offer their support.¹⁴¹

¹³⁸ *Promotion by Council of Europe Member States of an international moratorium on the death penalty*, Doc. 11303, 11 June 2007, Report, Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Pietro Marcenaro, adopted on 8 June 2007, Summary, p. 1.

¹³⁹ *ibid*, para 10.

¹⁴⁰ See, *Co-operation between the Council of Europe and the United Nations – Draft United Nations Resolution for a moratorium on the use of the death penalty*, item, 2.4, CM/Notes/1011/2.4 of 20.11.2007, 1011th meeting, 21 November 2007.

¹⁴¹ *Co-operation between the Council of Europe and the United Nations – Draft United Nations Resolution for a moratorium on the use of the death penalty*, Decision adopted at the 1011th meeting, 21 November 2007, paras 1-2.

The report concluded with stating that the Council joins the EU in promoting moratorium in the UN,¹⁴² and provided three recommendations, firstly that all member and observer states of the Council support the moratorium of the death penalty in the UN, that all Member States ratify the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, and finally that all remaining Member States ratify *Protocol 6* and *Protocol No. 13*.¹⁴³ Fátima Aburto Baselga stated that in the worldwide abolition of the death penalty “the Council of Europe should closely cooperate with other international organisations, including the European Union.”¹⁴⁴

The EU now has a developed worldwide strategy, and at the Third World Congress against the Death Penalty, held in Paris, February 2007, the Council of the EU presented a Declaration which stated:

[t]he European Union is at the forefront of abolitionist efforts around the world and will continue to oppose the death penalty in all cases and under all circumstances.¹⁴⁵

¹⁴² *ibid*, para 22.

¹⁴³ *ibid*, para 23.

¹⁴⁴ *Promotion by Council of Europe member states of an international moratorium on the death penalty*, Doc. 11321, 25 June 2007, Political Affairs Committee: Rapporteur for Opinion: Mrs. Fátima Aburto Baselga, para. 4.

¹⁴⁵ *Declaration by the Presidency on behalf of the EU on the occasion of the Third World Congress against the Death Penalty (Paris, 1-3 February, 2007)*, Brussels, 31 January, 2007, 5863/07 (Presse 14).

This abolitionist statement is very clear, and is a forceful declaration that it considers every country's capital judicial system in the world to be a target. Such a worldwide focus has been displayed by the EU at the United Nations.¹⁴⁶ Between 1994 and 2007, the EU attempted to pass a Resolution for a worldwide moratorium on the use of the death penalty in the General Assembly were met with various political obstacles which thwarted the implementation of the Resolution. However, the European Parliament, with the behind the scenes political support of the non-governmental organisation, Hands Off Cain, led the Resolution at the 62nd Session of the General Assembly, meeting on 18th December 2007. The Resolution was supported by the Council and it was passed.¹⁴⁷

7.4.2 The submission of *Amicus Curiae* briefs into the United States Supreme Court

¹⁴⁶ See, William A. Schabas, 'International Law, Politics, Diplomacy and the Abolition of the Death Penalty,' 13 *Wm. & Mary Bill Rts. J.* 417 (2004) pp. 437-8.

¹⁴⁷ *Moratorium on the use of the death penalty*, GA Res. A/C.3/62/L.29

The EU has filed *amicus curiae* briefs¹⁴⁸ into the US Supreme Court, and the Council has recorded its support of the arguments.¹⁴⁹ The *amicus curiae* brief provides an extra source of information which presents to the court the interests of global organisations and citizens.¹⁵⁰ As *amici*, the EU is becoming increasingly influential, contributing to the human rights discourse within the jurisprudence of the US Supreme Court. Research conducted by Paul M. Collins Jr,¹⁵¹ suggests that cases are more likely to be granted *certiorari* and be successful when *amicus curiae* briefs are filed. The EU has argued that it has an identifiable, “interest” in filing *amicus curiae* briefs and in *Roper v. Simmons* stated its interest as:

¹⁴⁸ *Amicus curiae* (friend of the court) briefs are filed by (*amici*) persons or groups who are not parties to the proceedings that the court is considering. The *amici* need to demonstrate that they have a legitimate interest in one or more of the legal questions before the court. The UK death penalty charity *Amicus* has mirrored the European Union strategy and filed *amicus curiae* briefs in cases involving mentally regarded inmates and juveniles, see Julian Killingley, *Execution of Juveniles and Mentally Retarded Defendants in the United States: Report of Amicus to the Foreign and Commonwealth Office*, (London: The Andrew Lee Jones Fund Ltd, 2005).

¹⁴⁹ *Death Penalty – Decision to submit a Statement of Interest in support of the European Union’s amicus curiae beief in a case before the United States Supreme Court (formerly before the Court of Criminal Appeals of the State of Texas) concerning a Mexican national sentenced to death*, CM/Del/Dec(2004)894/31.1, CM/Del/Dec(2005)911/13.1, CM/Del/Dec(2005)935/13.1, decision adopted at the 996th meeting of the Ministers’ Deputies, 23 May 2007.

¹⁵⁰ J.D. Kearney and T.W. Merrill, ‘The Influence of Amicus Curiae Briefs on the Supreme Court,’ 148 *Uni. Pen. L. Rev.* 743, (2000).

¹⁵¹ See, Paul M. Collins Jr., ‘Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation,’ *Law & Soc. Rev* vol. 38, no. 4 (2004).

[t]he EU and its Member States, as members of the international community, have a strong interest in providing information to this Court on international human rights norms in a case in which those norms may be relevant.¹⁵²

and the Council of Europe interest was declared as:

[t]he Council of Europe...fully concurs with the opinions and arguments submitted by the European Union. The Council of Europe has taken a firm position that everyone's right to life is a basic value and that the abolition of the death penalty is essential to the protection of this right and for the full recognition of the inherent dignity of all human beings.¹⁵³

In 2001, the European Union submitted an *amicus curiae* brief in support of *certiorari* in the case of *McCarver v. North Carolina*,¹⁵⁴ which concerned the execution of a mentally retarded inmate.¹⁵⁵ But the US Supreme Court held the case to be moot as North Carolina introduced a mental retardation statute preventing the death penalty for inmates with the mental condition. However, another case concerning a mentally retarded inmate came to the US Supreme Court in 2002. In *Atkins v. Virginia*, in holding that the executions of mentally retarded inmates was

¹⁵² Appendix A: Statement of Interest: The Council of Europe, p. 1a, Richard J. Wilson, *Brief of Amici Curiae: The European Union and Members of the International Community in Support of Respondent*, in the case of *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁵³ *ibid.*

¹⁵⁴ 533 U.S. 975 (2001).

¹⁵⁵ The mental health diagnosis "mental retardation" is termed as "learning difficulties" in the United Kingdom.

unconstitutional, Justice Stevens, referred to the European Union brief filed in *McCarver*, in a footnote, and stated that, “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”¹⁵⁶

The use of the European Union brief by Justice Stevens was severely criticized by both Chief Justice Rehnquist and Justice Scalia in their dissenting opinions. Both of the judges pointed to the sovereignty of the United States, and argued that the country itself was the ultimate decision-maker on punishment within its internal jurisdiction. Chief Justice Rehnquist stated that he needed to “call attention to the defects in the Court’s decision to place weight on foreign laws.”¹⁵⁷ He did not see “how the views of other countries regarding the punishment of their citizens provide any support for the Court’s ultimate determination,”¹⁵⁸ and that “if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant” (*italics in original*).¹⁵⁹ Furthermore, a more vehement dissent came from Justice Scalia when he stated that “the Prize for the Court’s Most Feeble Effort to fabricate “national consensus” must go to its appeal (deservedly relegated to a footnote) to the views of...members of the so-called “world community” (letters capitalised in original).¹⁶⁰ Justice Scalia also cited his

¹⁵⁶ *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) fn. 21. For the European Union brief see, www.eurunion.org/legislat/DeathpenaltyUSMcCarverBrief.htm.

¹⁵⁷ *ibid*, p. 322.

¹⁵⁸ *ibid*, p. 324-325.

¹⁵⁹ *ibid*, p. 325.

¹⁶⁰ *ibid*, p. 347.

own dictum in a previous US Supreme Court case of *Thompson v. Oklahoma*, when he stated:

[w]e must never forget that it is a Constitution for the United States of America that we are expounding...[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.¹⁶¹

Even though Justice Stevens merely referred to the EU brief in a footnote, it was enough to produce these two forceful dissenting opinions. Speedy Rice, an American Professor of Law and a death penalty litigator, is of the opinion that this brief revealed the central question as to the extent of an unfettered United States application of the death penalty. He argued that it helped pave the way for the introduction of international opinion against the United States capital judicial process.¹⁶²

What *Atkins v. Virginia* reveals is that as a legal strategy the EU *amicus curiae* brief is an effective tool which allowed the human rights discourse advanced by the EU and the Council to be incorporated within the decision making process of the US Supreme Court.

¹⁶¹ *ibid*, p. 348, citing, Justice Scalia, dissenting opinion in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), p. 868-869, n. 4.

¹⁶² Speedy Rice and Dave Keefe, Impact of International Law on the Death Penalty in the USA,' Warwick Law School Conference, 'Is the Death Penalty About to Execute Itself? 28th February 2004, www2.warwick.ac.uk/research_old/society/lawschoolforum2004.

The next case which the EU submitted an *amicus curiae* brief was in *Roper v. Simmons*,¹⁶³ which Justice Breyer referred to in holding for the majority that the execution of juvenile offenders was unconstitutional.¹⁶⁴ Justice Breyer only made a passing reference to the EU brief,¹⁶⁵ but concerning all international opinion, he held, “[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.”¹⁶⁶

Again this reliance on international opinion kindled the wrath of Justice Scalia. He held that “[t]hough the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.”¹⁶⁷ Justice Scalia stated that he did not “believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment.”¹⁶⁸ Then he continued “[a]cknowledgement of foreign approval has no place in the legal opinion of this

¹⁶³ Wilson, above, fn. 152.

¹⁶⁴ *Roper v. Simmons*, *ibid*, 555-578; see also, Dirk van Zyl Smit, ‘The Abolition of Capital Punishment for Persons Under the Age of Eighteen Years in the United States of America. What Next?’ (2005) 5 *HRLR* 2, 393

¹⁶⁵ *ibid*, opinion of Justice Breyer, part IV, 576-578

¹⁶⁶ *ibid*, 578.

¹⁶⁷ *ibid*, part III, 624.

¹⁶⁸ *ibid*, 625.

Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.”¹⁶⁹

Justice Scalia's renunciation of the effect of international law was criticised by Justice O'Connor, who although also dissented in the case, sought to open the door for international opinion in restricted circumstances. Justice O'Connor stated that international law could be used to provide a “confirmatory role” to an already existing United States penal practice, but that it should not be used to dictate change of the United States penal system. Justice O'Connor stated:

this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement—expressed in international law or in the domestic laws of individual countries—that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.¹⁷⁰

¹⁶⁹ *ibid*, 626.

¹⁷⁰ Dissenting opinion of Justice O'Connor, 604.

The last sentence of this passage of Justice O'Connor's dissenting judgment reaches the core of the question of sovereign right of the death penalty. Even if the whole international community had reached a consensus on a specific aspect of the death penalty, in this case the execution of juveniles, such consensus cannot influence the American consensus. The United States must come to the conclusion on its own, and then view the position of the international community. However, it is difficult to see the United States being able to totally isolate themselves from the Council and the European Union opinions. As such the policy of a sustained filing of *amicus curiae* briefs by the European organisations will have a significant impact as long as there are liberal judges like Stevens and Breyer who are willing to utilise them.

The filing of *amicus curiae* briefs is significant because it demonstrates that the Council's discourse is penetrating the sovereign use of the death penalty outside its borders. As such, it helps to confirm the legitimacy of the anti-death penalty arguments within its own borders because the greater acceptance of the anti-death penalty arguments, moves the discourse closer to facilitating a world-wide norm against the punishment.

Furthermore, it is demonstrated that although the Council has not been able to persuade the United States as an observer state to abolish the death penalty via political dialogue, it has been successful in contributing to a legal argument for the restriction of the punishment within the United States Supreme Court. As such, it can be seen how the discourse is intricately challenging the sovereign right of the death penalty internationally.

The next international sphere which is considered is the Council relationship with the Organisation for the Security and Cooperation in Europe (OSCE).

7.4.3 The Support of the Organisation for Security and Co-operation in Europe

The OCSE monitors the application of the death penalty within its forty-five participating states with the aim to increase transparency of the administration of the punishment and call for its restriction and abolition.¹⁷¹ There are currently forty-six members of the OSCE who are Member States of the Council.¹⁷² The United States, the Holy See and Canada, are members of the OSCE and are also observer states of the Council. The monitoring of the death penalty and the dissemination of information on the punishment in participating states has been recorded since 1999 in the annual OSCE publication *The Death Penalty in the OSCE Area*.¹⁷³

¹⁷¹ The Helsinki Final Act 1975 marked the creation of the Conference on Security and Co-operation in Europe (CSCE), and the Conference was transformed into the Organisation for the Security and Co-operation in Europe (OSCE). The OSCE currently has 55 participating states.

¹⁷² The Council countries considered by the OSCE to be abolitionist are: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Former Yugoslav Republic, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, and United Kingdom.

¹⁷³ The most recent edition is OSCE/ODIHR, *The Death Penalty in the OSCE Area: Background Paper, 2007* (Warsaw: OSCE, 2007). The annual publication covers the periods of June the previous year to June in the current year.

The OSCE participating states are not required to abolish the death penalty as a prerequisite for membership.¹⁷⁴ There are a number of conditions on the implementation of the punishment. The ‘Concluding Document of the 1989 Vienna Follow-up Meeting,’ states that participating states may only implement the punishment for “the most serious crimes in accordance with the law in force at the time of the commission of crime and not contrary to their international agreements.”¹⁷⁵ The OSCE places significant emphasis on the transparency of participating state practice, as the Copenhagen Meeting in 1990, the OSCE established that they must, “exchange information...on the question of the abolition of the death penalty and keep that question under consideration,” and, “make available to the public information regarding the use of the death penalty.”¹⁷⁶

The death penalty is considered under the auspice of the OSCE’s ‘Office for Democratic Institutions and Human Rights’ (ODIHR). The publication of materials on the use of the death penalty in participating states may be seen as part of the continual “work in progress” of the OSCE, and this consideration of the punishment

¹⁷⁴ The current OSCE participating states which retain the death penalty in wartime are Albania and Latvia, the countries which are *de facto* abolitionist are Kazakhstan, Kyrgyzstan, the Russian Federation and Tajikistan, and the countries which have the death penalty in peacetime and which administer executions are, Belarus, the United States of America and Uzbekistan. See, *the Death Penalty in the OSCE Area: Background Paper*, 2006, p. 2.

¹⁷⁵ Concluding Document of the 1989 Vienna Follow-up Meeting, Questions relating to security in Europe, para 24, included in, OSCE/ODIHR, *OSCE Human Dimension Commitments*, vol. 2: *Chronological Compilation*, 2nd Ed, (Warsaw: OSCE, 2005), p. 51.

¹⁷⁶ Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, para 17.7-8, included in *OSCE Human Dimension Commitments vol. 2: Chronological Compilation*, p. 75.

can now be seen as part of its “normative formulations.”¹⁷⁷ The first time the OSCE considered the death penalty was in 1989 at its Vienna Follow-up Meeting, during “Questions relating to security in Europe,” when it stated:

[w]ith regard to the question of capital punishment, the participating States note that capital punishment has been abolished in a number of them. In participating States where capital punishment has not been abolished, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to their international commitments. This question will be kept under consideration. In this context, the participating State will co-operate within relevant international organisations.¹⁷⁸

The OSCE promotes greater transparency of participating state’s capital judicial systems and at the meeting in 1990 in Copenhagen, it established that participating states should exchange information at the Conference on the Human Dimension.¹⁷⁹

This call for keeping the question of abolishing the death penalty at the forefront of

¹⁷⁷ The ‘Thematic Compilation,’ states, “From the outset, the Conference on Security and Co-operation in Europe (CSCE), later transformed into the Organisation for Security and Co-operation in Europe (OSCE), has been very much a ‘work in progress,’ an ongoing process that has led to a significant expansion of its normative formulations,” in, OSCE/ODIHR, *OSCE Human Dimension Commitments, vol. 1, Thematic Compilation*, 2nd ed, (Warsaw: OSCE, 2005), p. xi.

¹⁷⁸ Concluding Document of the 1989 Vienna Follow-up Meeting, ‘Questions relating to security in Europe,’ para 24.

¹⁷⁹ Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, para 17.7.

participating state's political consideration and for ensuring the transparency of the capital judicial process, is a common feature of proceeding OSCE Documents.¹⁸⁰ Furthermore the OSCE has specific activities related to promoting abolition of the death penalty in retentionist participating states, which include providing support for awareness raising campaigns, conducting training for national capital lawyers, contributing to oral and written *demarches* on both specific case and general developments and publishing the annual report on the death penalty in the OSCE area.¹⁸¹

William Schabas has argued that the OSCE has only achieved “modest results.”¹⁸² Although the Documents adopted at the various meetings by the OSCE have progressed towards a promotion of restriction and abolition, the Vienna Document merely provided a “cautious statement,” and the Document of the Copenhagen Meeting only adopted “tame provisions.”¹⁸³

During the drafting of the OSCE documents, motivations held by some participating states weakened the abolitionist positions which Schabas has recognised. Lydia

¹⁸⁰ See, Document of the 1991 Moscow Meeting of the Conference on the Human Dimension of the OSCE, para 36; Concluding Document of the 1992 Helsinki Summit, § 58; Concluding Document of the 1994 Budapest Summit, § 19, all included in, OSCE/ODIHR, *OSCE Human Dimension Commitments, vol. 2: Chronological Compilation*, 2nd Ed, (Warsaw: OSCE, 2005).

¹⁸¹ See, Office for Democratic Institutions and Human Rights, Feature: Abolishing the death penalty, http://www.osce.org/odihr/iten_2_224.htm.

¹⁸² William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed, (Cambridge: Cambridge University Press, 2002), p. 299.

¹⁸³ *ibid*, pp. 299-300.

Grigoreva, the Human Rights Adviser at the OSCE has also confirmed that with the United States of America as a participant State, it is extremely unlikely that the organisation will become abolitionist.¹⁸⁴ In the 2006 OSCE report on the death penalty, Margaret Griffey and Laurence Rothenberg, both from the US Department of Justice, argued that the existence of the death penalty in the United States was a product of a “robust American democratic process.”¹⁸⁵

Some states are clearly attempting to hold onto the monopoly of the application of the death penalty, and this is recognised in selected Human Dimension Implementation Meetings. In 1989, a group of countries introduced a proposal on abolition and noted that the death penalty was being abolished in “most of the legal systems of the participating States within the context of a human rights movement,” and called for “progressive abolition in peacetime” for all participating States. But the text was not adopted.¹⁸⁶

Furthermore, at the 1990 Copenhagen Meeting of the Conference on the Human Dimension, there was another proposal calling for progressive abolition of the death

¹⁸⁴ Information from Lydia Grigoreva, Human Rights Adviser, Human Rights Department, OSCE Office for Democratic Institutions and Human Rights, email correspondence, 10th July, 2007.

¹⁸⁵ Margaret Griffey and Laurence E. Rothenberg, *The Death Penalty in the United States*, p. 35, in *The Death Penalty in the OSCE Area*, 2006.

¹⁸⁶ *Abolition of the Death Penalty, Proposal Submitted by the Delegation of Portugal, Austria, Cyprus, France, the Federal Republic of Germany, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, San Marino, Spain and Switzerland*, OSCE Doc. CSCE/CDHP.28, 19 June 1989.

penalty in peacetime,¹⁸⁷ but two days after this proposal was submitted, the delegations of Austria, Denmark, Finland, Iceland, Norway, and Sweden, submitted a juxtaposed proposal which did not include a call for progressive abolition in peacetime.¹⁸⁸ It appeared that with the absence of the call for progressive abolition in the Copenhagen Document, that the second proposal was adopted, and this refusal to call the states to abolition has continued through to the adoption of the OSCE's 2006 report on the death penalty.

Selected participating states have also refused to make available data on the application of the capital judicial system, and this is in violation of the Copenhagen Document. In 2000, the ODIHR noted that the governments of "Belarus, Kazakhstan, Tajikistan, Turkmenistan and Uzbekistan, regard the information relating to capital punishment as a state secret and refuse to disclose relevant material – a practice that is in clear contradiction to paragraph 17.8 of the Copenhagen Document."¹⁸⁹ More recently, it was noted in the 2005 Report on the

¹⁸⁷ *Abolition of the Death Penalty, Proposal Submitted by the Delegation of Portugal, and those of Belgium, Cyprus, Czechoslovakia, France, the German Democratic Republic, the Federal Republic of Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, the Netherlands, Romania, San Marino, Spain and Switzerland*, OSCE Doc. CSCE/CHDC.18, 6 June 1990.

¹⁸⁸ *Abolition of the Death Penalty, Proposal Submitted by the Delegates of Austria, Denmark, Finland, Iceland, Norway, and Sweden*, OSCE Doc. CSCE/CHDC.13, 8 June 1990.

¹⁸⁹ 'The Death Penalty in the OSCE Area,' ODIHR background paper prepared for the seminar on 27 March, 2000, Human Rights and Inhuman Treatment or Punishment, cited in Schabas, above, fn. 183, p. 301.

death penalty that Albania and Tajikistan did not respond to the ODIHR's questionnaire for the dissemination of information on the death penalty.¹⁹⁰

The OSCE is attempting to ensure that the dialogue on the death penalty continues. It places human rights considerations at the forefront to attempt to persuade retentionist participating states. Furthermore, in not requiring participating states to abolish the death penalty as a prerequisite for membership, the organisation is encouraging a constructive dialogue which does not force retentionist states away. As such the process adopted by the OSCE can be seen to be more compatible with the Committee of Ministers of the Council of Europe, rather than the Parliamentary Assembly.

The OSCE approach reflects an engagement with the state right of the death penalty, and it seems the role of human rights is not immediately effective in renouncing the sovereign right of the punishment. However it does promote a discourse which can be used to encourage the state in making the decision to remove the punishment from its laws.

7.7 Conclusion

The fact that the Council is now a *de facto* abolitionist region means that as a human rights project, it has been extremely successful. Through the strategies adopted by

¹⁹⁰ OSCE/ODIHR, *The Death Penalty in the OSCE Area: Background Paper 2005*, (Warsaw: OSCE, 2005), p. 13.

the Committee and the Assembly the death penalty has been removed. But if the surface of this success is scratched, there are identifiable areas of concern. Firstly, the proximity of the Committee to the Member States ensures that the sovereign issues of the governments will always manifest. This has been intricately displayed in the previous chapter on the issues of the amendment of Article 2 and in this chapter, we have seen it occur within the establishment of prerequisites for membership.

Furthermore, the issue of the sovereign state's right to choose for itself whether or not to implement the death penalty, has been seen in the example of Russia. Russia has been a thorn in the side of the Council through its refusal to ratify *Protocol No. 6*. Both the Parliamentary Assembly and the Committee of Ministers have "repeatedly urged the Russian Federation to ratify *Protocol No. 6*, thus making the Council of Europe a *de jure* death penalty free zone, and will continue to follow progress towards ratification."¹⁹¹ There is a symbolic importance to Russia's ratification as it would produce a universal legal statement within the Council region. Without it the Council cannot make the claim that it has achieved *de jure* abolition of the punishment for all Member States.

The Council has also exported its discourse against the death penalty. This is significant for two main reasons. Firstly, it displays that the Council has confidence

¹⁹¹ *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty, Parliamentary Assembly Recommendation 1760 (2006)*, Reply adopted by the Committee of Ministers on 31 January 2007, at the 985th meeting of the Ministers' Deputies, CM/AS(2007)Rec1760 final, 2 February 2007, para 2.

in what it has achieved internally. Secondly, the successes which have been witnessed internationally, demonstrates that the human rights discourse has hegemonic force in the international arena and it is being utilised to restrict the sovereign application of the punishment.

The Council has supported the EU in its various global initiatives, especially with the passing of the Resolution on the Moratorium on the use of the death penalty in December 2007 in the United Nations General Assembly. This was a landmark victory for all abolitionists around the world, and both the European Union and the Council of Europe played an important role in the passing of this motion. The *amicus curiae* briefs filed in the United States Supreme Court have also been effective in restricting the capital judicial system. What can be seen is that whereas the Council has not been effective in persuading the United States from abolishing the punishment for a requirement as an observer state, it has been effective in helping ensure that the United States cannot execute mentally retarded inmates or juvenile offenders.

As a whole, the promotion of abolition within the expansion of Europe and the exporting of the discourse can be seen to be very effective. The nature of the discourse with its relationship with sovereignty, as discussed throughout this thesis is changing. There have been some essential shifts within the political relationships which locate the power and right to use the death penalty. The conclusion to this thesis will now review the work considered and evaluate the solidity of the project which the Council has constructed against this penal practice.

Chapter Eight:

Conclusion: The Removal of the Death Penalty as a Continuous Human Rights Project

8. Conclusion: The Removal of the Death Penalty as a Continuous Human Rights Project

8.1 Introduction

This chapter is divided into three parts. In Part One, the preceding chapters are reviewed and a genealogy is summarised which demonstrates that a legal and political change has occurred with regards to the death penalty. A penological evolution has been witnessed whereby the death penalty, which was viewed as a legitimate punishment during the creation of the Council and the drafting of the *Convention*, now appears to be an illegitimate punishment. This shift occurred firstly within Western European states by 1981, and then was developed by the Council and encompassed by the Central and Eastern European countries following expansion which began in 1994.

In Part Two, the solidity of the Council's abolitionist discourse is analysed with the possibility of the return of the death penalty being considered. The theoretical and normative approaches to the sovereign state right of the punishment, and the relationship of law and the death penalty, are outlined. It will be questioned whether the genealogy charted in this thesis has now rendered it impossible for the death penalty to return, or whether there are exceptional circumstances in which the punishment may be restored.

Finally, in Part Three the current Council strategy and discourse against the death penalty is considered and its function is questioned with regards to the maintaining of the removal of the punishment in the Council and its Member States. It is argued that for the continual abolition of the death penalty, the human rights standards and political philosophy promoted by the Council must be seen as an ever evolving political and legal project. As such, this conclusion to the thesis is that the hegemonic Council anti-death penalty discourse should never be treated with complacency. For it to remain effective regionally and globally, there must be effective arguments placed against those movements for the death penalty to reappear in response to the fear of violence.

8.2 The Evolving Political and Legal Mandate Against the Death Penalty

The genealogy explored in this thesis reveals, essentially, a change in the acceptance of the death penalty by the Member States and the organs of the Council of Europe in 1949, to the opinion which now views the death penalty to be illegitimate.¹ At the creation of the Council of Europe the *Statute* facilitated the acceptance of the death penalty. Chapter Two demonstrated that the punishment was intricately woven within *Statute* Article 1 which promoted a European “common heritage.” The *Statute* mirrored the Enlightenment social contract theory

¹ As Sangmin Bae has observed, “[t]he focus shifted from the state’s right to kill to a citizen’s right not to be executed by the state,” in *When the State No Longer Kills: International Human Rights Norms and Abolition of Capital Punishment*, (Albany: SUNY, 2007), p. 2.

and also the vast historical heritage of the punishment from the polity of Ancient Greece to the mid Twentieth Century European nation states.

Further support can be seen as the *Statute* manifested the principles of internal jurisdiction of nation states, and the process of international relations laid down in the *Treaty of Westphalia* three hundred years earlier.² As a consequence the provisions for allowing European governments to formulate municipal capital laws were present at the genesis of the European human rights regime. The possibility of the punishment was also provided under the *Statute* Article 3 identification of the “rule of law:” as the death penalty was a legal sanction it was implicitly accepted.

These affirming legal and political mechanisms were then interwoven within the drafting of the *Convention* and thus facilitated the insertion of the punishment into the text of Article 2(1). The punishment was also not considered to be a violation of the prohibition of inhuman punishment under Article 3. In his work on sovereignty post 1989, Jacques Derrida, the French philosopher, aptly summed up this initial legislative position when he identified that the original texts of the international human rights instruments following World War Two:

have remained, at least in their letter, highly precarious...in a word we can say that they relied on a “right to life” whose concept and axiom are more than problematic...with the best intentions in the world, [the drafters] had to stop at

² Immanuel Kant had also identified the benefits of an international social contract in his *Perpetual Peace: A Philosophical Sketch*, in H.S. Reiss (ed), *Kant: Political Writings* (Cambridge: Cambridge University Press, 1970).

the threshold of the sovereignty and right of exception of states – whom they only *advised* not to practice the death penalty except in an exceptional way and according to legal procedures protecting the rights of the accused [emphasis in original].³

The extracts from the *travaux préparatoires* in Chapter Two supports Derrida's observation. Such advice was a demonstration that the drafters of the *Convention* were not completely happy with the death penalty, but following war there was an overriding political sentiment that it was required for defence and the punishment of war criminals. Although following the atrocious devaluing of human life in war, this sentiment was not felt by all.

However, even before the war, it would not be completely correct to argue that this punishment was universally accepted. In the British Select Committee on Capital Punishment in 1930, various European governments were recorded as stating categorically that they did not believe that the death penalty was necessary for the general protection of their state.⁴ But the execution of war criminals following World War Two can be seen to be implemented under exceptional, but legitimate, circumstances.

³ Jacques Derrida, 'Death Penalties,' p. 153, in Jacques Derrida and Elizabeth Roudinesco, *For What Tomorrow...A Dialogue*, (Stanford: Stanford University Press, 2004).

⁴ See the testimony from Belgium, Denmark and Sweden in, *Report of the Select Committee on Capital Punishment 1930* (London: HMSO, 1930), pp. 257, 353, 358, and the conclusion that the death penalty may be abolished in the United Kingdom without "endangering life or property, or impairing the security of society," at p. xcvi.

It was not a politically opportune time for the drafters of the *Convention* to legislate the abolition of the punishment, and here the influence of the United Kingdom was significant. As an Allied victor against the Nazis, the British government endorsed the executions of war criminals and thus any anti-death penalty provision within the *Convention* would have been incompatible with the hegemonic Allied political sentiment. What is also significant, as argued in Chapter Three, is that Denmark, Iceland, Italy, the Netherlands, Norway, West Germany and Sweden, which did not impose the death penalty for ordinary criminal offences, were silent in the *Convention* drafting debates, and are not recorded as questioning the incorporation of the punishment within Article 2(1).

Other issues were debated, such as the prohibition of torture, but the death penalty appeared to have unanimous acceptance. What this demonstrates is that at the beginning of the *Convention* system, even though the states were beginning to remove the death penalty from their own systems, the governments wanted to make the penal decisions and choose for themselves the extent of punishment. They did not, yet, want to allow a supra-national body dictate policy on the death penalty.

This independence of choice was then explored in Chapter Three which considered the removal of the death penalty from Western European countries. Such use of the death penalty post-World War Two reveals that the punishment was thought of as an exclusive issue for the European states. But there was an evolution in sentiment, both political and legal. What occurred was that by 1981, the Western European governments had all abandoned the death penalty for ordinary criminal offences. In effect, although the states were reserving for themselves the right to choose

punishment as a manifestation of internal jurisdiction, they had independently chosen not to impose the punishment. This penological development had occurred without any centralised position on the punishment by the Council. Significantly, this change occurred outside of any human rights instruments, but was implemented politically and through a renunciation of the utilitarian arguments for the punishment.

Chapter Four investigated how the death penalty then became encompassed by the Council as a human rights issue. This can be seen as an initiation of *catch-up* with the Western European position. Initially, the Council organs adopted the punishment as a political issue reserved for the Member States to be implemented within their domestic, and colonial, jurisdictions.

In 1957 the Sub-Committee of the European Commission of Human Rights in *Greece v. the United Kingdom*, concerned *inter alia*, the application of emergency provisions during colonial rule of Cyprus. The death penalty was used during the 1956 Cypriot revolt, but the Commission did not specifically adjudicate on the punishment, but held that under *Convention* Article 15 the general actions of the United Kingdom government were permissible. Hence, the death penalty was considered a paramount political issue over any human rights considerations. Furthermore, the first European Committee on Crime Problems report on the death penalty in 1962 did not consider the death penalty as a human rights issue, but focused on the punishment as a municipal state question.⁵ As such, the report

⁵ Marc Ancel, *The Death Penalty in Europe*, (Strasbourg: Council of Europe, 1962).

predominately was concerned with collecting data on the legislation of capital crimes in European.

It should also be stated that in the 1950s the seedlings for a regional rejection of the punishment sprouted. The *Convention on Extradition* was debated and drafted and it came into force in 1960. Although it provided a multilateral procedure for restricting the death penalty, it was not specifically attached to human rights standards, but to the political processes of negotiation within extradition proceedings. Hence, it did not make a substantial contribution to the death penalty being a human rights issue, but it was significant because, under Article 11, this Convention was the first regional document to provide for the restriction of the punishment within the Council and its Member States.

The tide then turned markedly when in 1973 Miss Astrid Bergegren, a Swedish Parliamentarian within the Parliamentary Assembly, presented a motion for the abolition of the death penalty.⁶ Although her efforts, and those of the *rapporteur* Bertil Lidgard, who presented a report in 1975 building upon the first motion, did not directly bear fruit at this time, they laid a platform which was later successfully implemented.

The first specific measures to challenge the punishment within the Council Member States, which was adopted by the Parliamentary Assembly, came in 1980. The then

⁶ *Motion for a resolution on the abolition of capital punishment* (Doc. 3297), Legal Affairs

Committee, 8th sitting, 18 May 1973.

rapporteur, Carl Lidbom, authored a report⁷ that produced the platform for *Protocol No. 6*, which significantly restricted the death penalty as it abolished it in times of peace. What is significant for this period was that the *Statute* identification of “common heritage” was now changing from one which accepted the death penalty to one which did not. In the debates of Lidbom’s 1980 report he stated, “[w]hat therefore remains for us to make is a political choice based on those values which form our common heritage.”⁸

Then in 1989 came the landmark decision in *Soering v. the United Kingdom*,⁹ where the European Court of Human Rights delivered an intricate decision which held that human rights provisions can be utilised to curtail the death penalty. Issues such as the extraterritoriality of the *Convention* when extradition proceedings include capital charges, the death row phenomenon, the quality of the capital judicial system in requesting states, the age and mental condition of the defendant, and the application of these within *Convention* Articles 2(1) and 3, and the significance of *Protocol No. 6* were considered.

Soering displayed that the Court affirmed the development of the human rights discourse of the Parliamentary Assembly. Through this decision, the Assembly now had a precedent and judicial argument for the general promotion of abolition.

⁷ *Report on the abolition of capital punishment*, Doc. 4509, text adopted at the 2nd and 3rd sittings, 22 April 1980.

⁸ Parliamentary Assembly, Official Report of Debates, 32nd Ordinary Session, Abolition of capital punishment, Debate on the report of the Legal Affairs Committee, Doc, 4509 and amendments, (2nd and 3rd Sittings), 22 April 1980, p. 53.

⁹ *Soering v. the United Kingdom*, Application No. 14038/88, 19 January 1989.

Although the intricate differences between the Assembly and Court's approaches to Articles 2(1) and 3 were discussed in Chapters Five and Six, what can be observed as a general principle is that both the Assembly and the Court agreed that human rights, and particularly the *Convention*, provided a legal mechanism to curtail the punishment. History reveals that the Court has, on the whole, utilised Article 3 in holding that capital suspects cannot be extradited, that the conditions on death row are inhuman in certain circumstances, that a death sentence following an unfair capital trial is prohibited, and that with the almost universal ratification of *Protocol No. 6*, the punishment in peacetime is inhuman.

Furthermore, the signatures and ratifications of *Protocol No. 13*, which abolished the death penalty in all circumstances, have now confirmed this abolitionist discourse, both from the centralised position of the Council and also, from the perspective on the Member States. Significantly, as detailed in Chapter Seven, this abolitionist discourse has also been accepted within Central and Eastern Europe, and is also being exported globally. The Council is promoting a norm of abolition both within its borders and externally.

This is nothing short of a penological revolution. But it is not merely confined to penology. We must return to the political philosophical considerations of the Enlightenment social contract, and the issues of international relations and sociological enquiry, which identifies the internal jurisdiction mandated at the *Treaty of Westphalia*. The Enlightenment social contract must now be read as being modified as a result of the Council's anti-death penalty discourse. We need to recall why the Enlightenment philosophers legitimised the citizens transferring to the

sovereign the right to life or more appropriately, the right to judicially kill them. The essential reason was that in giving the sovereign the right to life, the sovereign in return would have the power to protect their lives. The paradox was that, because of the need for law and order, and also, to prevent threats to the state and sovereign, the ruler must have the right to kill.

Michel Foucault engaged with Rousseau's argument, "in putting the guilty to death, we slay not so much the citizen as an enemy"¹⁰ and recognised that during the Enlightenment the purpose of punishment had shifted from the "vengeance of the sovereign to the defence of the state."¹¹ This followed Thomas Hobbes¹² and John Locke¹³ who both advocated a variation on the same theme: the sovereign can reserve the right to life and death. However, the circumstances in which the death penalty can be applied were greatly confined by the philosophers, and although they endorsed the death penalty within the general criminal law, they thought that the punishment was most significantly legitimised by circumstances when the defence of the state was threatened, and thus imposed in an act of self-defence.

What is not revealed by most abolitionist scholars is that the great Enlightenment humanist Cesare Beccaria also reserved the death penalty for such national self-defence when he stated that the death penalty can be imposed on individual(s)

¹⁰ Jean-Jacques Rousseau, 'The Social Contract,' p. 209, in *The Social Contract and Discourses*, (trans: G.D.H. Cole) (London: Everyman, 2004).

¹¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, (London: Penguin, 1976), p. 90.

¹² Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press), Chapter 21, para 7.

¹³ John Locke, *Second Treatise of Government*, (ed: C.B. Macpherson) (Indianapolis: Hackett Publishing, 1980), p. 8.

“when though deprived of his liberty, he has such power and connections as may endanger the security of the nation.”¹⁴ This Enlightenment social contract clause on the right to life was reflected in the *Convention* drafting debates when in the First Session of the Consultative Assembly, Mr. Maccus, the Greek representative and Mr. Maxwell-Fyfe, the United Kingdom representative, spoke of the need for the state to be able to defend itself against tyrants.¹⁵

As we move away from 1949-50, the perspectives on the social contract shifted. The Council has contributed to both peace in Europe and also to the demise of the death penalty, and as such, it has rendered the political and social circumstances inapplicable for the legitimate application of the punishment. Foucault analysed the social contract theory and asked at the coming together of the individuals to form the sovereign for self-preservation, whether, “can life actually become one of the rights of the sovereign?”¹⁶ The answer appears to be that during the Enlightenment the transfer of the right to judicially kill was thought necessary.

The human rights discourse which argues that the death penalty is a violation of the right to life and also that it is inhuman punishment, coupled with the governments signatures and ratifications of *Protocol No. 6* and *Protocol No. 13* indicate that the governments are agreeing that they no longer have the right of the death penalty and as a result, it is developing into a human rights norm with political acceptance. As

¹⁴ Cesare Beccaria, *An Essay on Crimes and Punishment*, (Chicago: Branden Press, 1983), Chapter 28.

¹⁵ *TP*, 1, p. 108, 120.

¹⁶ Michel Foucault, *Society Must be Defended*, (trans: David Macey) (London: Penguin, 2003), p. 241.

such the Council has modified the Enlightenment social contract, and through its human rights discourse it has renounced this theoretical approach which attaches the right of capital punishment for ordinary criminal offences to the sovereign. Council Member States can no longer create capital legislation in peacetime, and it is the intention of the organisation that the Member States should also not have recourse to the punishment in wartime either.

Furthermore, the Parliamentary Assembly can also be seen as challenging the state's monopoly of internal jurisdiction to create municipal capital laws as established within the *Treaty of Westphalia*, and also the sociological observation on this point made by Max Weber. Within the Westphalian tradition, Weber identified that states possess "the monopoly of the legitimate use of physical force in a given territory."¹⁷ In this specific construct, Weber had not incorporated the mechanisms of supranationalism and the effects of regionalism on such territorial monopolies.

However, the European historical common heritage, outlined in Chapter Two, reveals that such legitimate physical force could include the death penalty. Following the evolution of the Council's discourse against the punishment, and the state's acceptance of this, the important words here are "monopoly" and "legitimacy." The question arises as to once the sovereign state joins the Council to what extent has it relinquished its monopoly to decide whether or not to impose the death penalty. Caroline Ravaud and Stephen Trechsel have argued that "the Convention, like many international legal instruments, is a pledge of good conduct

¹⁷ Max Weber, 'Politics as a Vocation,' p. 87, in *From Max Weber*, (ed, H.H. Gerth and C. Wright Mills) (London: Routledge, 1991).

given by states, at which in theory, have a monopoly on the lawful use of violence.”¹⁸ So adopting the *Convention* and ratifying *Protocol No. 6* suggests that the abolition of the death penalty is consistent with a “pledge of good conduct.”

The research presented within this study indicates that the states do play a prominent role in determining the renunciation of the death penalty. Once Member States have signed and ratified *Protocol No. 6* and *Protocol No. 13* they have surrendered the monopoly to decide capital punishment: and as such departed from the orthodox Westphalian position.¹⁹ The only way they can get the monopoly back is to renounce membership and leave the Council. However, this would be a politically and economically difficult decision to make. For some countries, membership of the Council rendered possible membership of the European Union and the political and economic benefits with it. No country has hitherto renounced its membership in order to reintroduce the death penalty.

The next issue is one of “legitimacy.” The Parliamentary Assembly has declared that the “death penalty has no legitimate place in the penal systems of modern civilised societies.”²⁰ How is the term “legitimacy” to be imputed into the discourse

¹⁸ Caroline Ravaud and Stephen Trechsel, ‘The death penalty and the case-law of the institutions of the European Convention on Human Rights,’ p. 80, in Council of Europe, *The Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

¹⁹ In a different context, Bill Bowring has also identified fora of international law where the Westphalian model has now been departed from, see, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics*, (Abington: Routledge-Cavendish, 2008), p. 59.

²⁰ Report, above, fn. 7. p. 3.

against the punishment? The term is not specifically used within *Convention* Articles 2(1) and 3, but it has been juxtaposed with the Assembly's analysis of Article 3. This Article is now viewed through a new notion of European values which advocates that the death penalty is not "legitimate." By creating a new human rights position the Assembly has strengthened the prohibition of inhuman and degrading punishment.

This rhetoric was adopted by the *rapporteur*, Renate Wohlwend when she affirmed the 1994 position in a 2001 Resolution which stated:

that the death penalty has no legitimate place in the penal systems of modern civilised societies, and that its application constitutes torture and inhuman and degrading punishment within the meaning of Article 3 of the European Convention on Human Rights.²¹

There appears to be no turning back from the Parliamentary Assembly's exclaiming that the death penalty is illegitimate, and this argument has been repeated like a mantra within successive Reports and Resolutions.²² The Assembly is seeking to develop a new human rights norm against the death penalty. Costas Douzinas has

²¹ *European Convention on Human Rights – Draft Protocol No. 13 on abolition of the death penalty in all circumstances*, Assembly Doc. 9291 14 December 2001.

²² See, Resolution 1349 (2003) *Abolition of the death penalty in Council of Europe observer states*, text adopted by the Assembly on 1 October 2003 (30th sitting); *Report, Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, Doc. 10911, 21 April 2006; *Promotion by Council of Europe member states of an international moratorium on the death penalty*, Doc. 11321, 25 June 2007.

specifically observed that “human rights have the ability to create new worlds, by pushing and expanding the boundaries of society, identity and law.”²³ The Assembly is expanding the boundaries of the Council’s human rights discourse, and has taken the reach of the arguments and policies away from a literal extraction of the *Convention* text.

Chapter Seven then considered the further expansion of the boundaries of the Council’s discourse to the joining Central and Eastern European states post 1994, and then to the internationalizing of the discourse through the Council’s joining the EU and the OSCE in their abolition initiatives.

During the Council’s expansion it has been demonstrated that the anti-death penalty discourse has, on the whole, been successful. With some exceptions, most notably the Ukraine with its imposition of executions in its first two years of membership and Russia’s stalwart refusal to ratify *Protocol No. 6*, expansion has led to a widening of the abolition sphere. This is a testimony to the legitimacy of the Council’s anti-death penalty position. The Council is also continuously monitoring the Member State’s renunciation of the punishment, and the consequence of enlargement has resulted in a greater acceptance and agreement with the anti-death penalty position.

²³ Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, (Oxford: Hart Publishing, 2000), p. 343.

Fatimá Aburto Baselga has affirmed that “the Council of Europe should closely cooperate with other international organisations,”²⁴ in the promotion of abolition. The Council has joined with the EU and the OSCE. Both these associations reveal that the international initiative against the death penalty is still a necessary project. The results within the OSCE have been limited, but the supporting of the Resolution for a moratorium on the use of the death penalty, which was adopted in the United Nations General Assembly on 18 December 2007 was a great success.²⁵ This was a remarkable achievement because this resolution marked the first time the General Assembly had supported a call for a worldwide moratorium. Furthermore, the Council has joined the European Union in filing *amicus curiae* briefs into the United States Supreme Court, and the Court used the briefs to support its majority holdings that it was a violation of the Eighth Amendment to execute the mentally retarded²⁶ and also juvenile offenders.²⁷

The arguments against the death penalty in the international arena are still required and so too is an affirming discourse within the Council’s region. There have been some strong, and some tentative, political attempts to reintroduce the punishment. We now consider these briefly below.

²⁴ *Promotion by Council of Europe member states of an international moratorium on the death penalty*, Doc. 11321, 25 June 2007, Political Affairs Committee: Rapporteur for Opinion: Mrs. Fátima Aburto Baselga, para. 4.

²⁵ *Moratorium*, above, fn. 1.

²⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁷ *Roper v. Simmons*, 543 U.S. 551 (2005).

8.3. The Jurisprudence of Isolating and Renouncing the Exceptional Case

Perceived threats to public order such as in times of war, during high crime rates or terrorist violence, sometimes create a sentiment for harsh punishments as a response.²⁸ As such it appears that the possibility of the return of the death penalty is an event which the Council will have to continually guard against. In *Öcalan v. Turkey*, Judge Garlicki stated in his Partly Concurring, Partly Dissenting opinion that:

it may be true that the history of Europe demonstrates that there have been wars, like the Second World War, during which (or after which) there was justification for capital punishment...it would be rather naïve to believe that if a war of a similar magnitude was to break out again, the Convention as a whole would be able to survive, even if concessions were made with regard to capital punishment.²⁹

Judge Garlicki's opinion here provides the exceptional circumstance where the death penalty may have "justification." He attempted to mark the threshold of the *Convention* system and argues that the power of the *Convention* resides in a

²⁸ Conor Gearty identified that within the British Constitutional tradition that "where there has never been a civil liberty to incite to kill, it has always been possible to campaign for the restoration [or extension] of the death penalty," in *Principles of Human Rights Adjudication* (Oxford: Oxford University Press, 2004), p. 36.

²⁹ *Öcalan v. Turkey*, Application no. 46221/99, [GC] judgment, 12 May. 2005, Partly Concurring, Partly Dissenting Judgment of Judge Garlicki.

peaceful equilibrium maintained in Europe. As such wars of the “magnitude” of World War Two have the potential to nullify the abolitionist mandate.

The key point here is the possible reintroduction of the death penalty through “concessions.” It appears that the judge had in mind political concessions which would allow for the suspension of the Council’s supervisory machinery, and/or extensive legal derogation under *Convention* Article 15. Jacques Derrida has identified a similar situation when he stated, “the abolition of the death penalty in any given society is always a contingent thing. It might be brought back at any time, depending on the state of political consensus.”³⁰ Adam Thurschwell similarly identified that the return of the death penalty depends upon political events as he argues that the punishment is “always ready to bubble up as a political option under the pressure of a particularly heinous crime or a political threat to the state.”³¹

In response to the above arguments, the Council has adopted *Protocol No. 6* and *Protocol No. 13* which abolish the punishment in all circumstances, and provide a legal removal of the punishment. It is appropriate to analyse the use of the word “abolition” within the dialogue between the Parliamentary Assembly and the Committee of Ministers, and also the adoption of the word in *Protocol No. 6* and *Protocol No. 13*.

³⁰ Jacques Derrida stated this during a seminar on the death penalty at Cardozo Law School, as recorded by Kyron Huigens, *Derrida on the Death Penalty*, Cardozo Life, Winter 2001, p. 23, www.cardozo.net/life/winter2001/derrida

³¹ Adam Thurschwell, ‘Ethical Exception: Capital Punishment in the Figure of Sovereignty,’ in Austin Sarat and Jennifer Culbert, (ed) *Killing States: Lethal Decisions, Final Judgments*, (Cambridge: Cambridge University Press, 2008), p. 15 forthcoming.

The Latin etymological meaning of “abolition” derives from *abolerē* which means “to destroy, annihilate,” and it appears that the Council is advancing a principled position using the Protocols to identify that the punishment can be abolished forever. Specific examples from Parliamentary Assembly documents can be seen including the citing of Albert Camus’s ideological statement, “in the unified Europe of the future the solemn abolition of the death penalty ought to be the first article of the European Code we all hope for.”³²

Such sentiments have been endorsed within Assembly reports. For instance, a 2006 Report stated, “[c]apital punishment must be totally removed once and for all from the legislation of all countries which strive to uphold democracy, the rule of law and human rights.”³³ Renate Wohlwend noted in her final report before retiring as *rapporteur* for the Parliamentary Assembly that, “[i]t is taking a long time to bring about abolition of the death penalty,” and that “the anxieties felt by the Assembly for the last decade remain.”³⁴ These statements are symptomatic of the principled position of *once-abolished-always-abolished*. But such a finite, immemorial,

³² Albert Camus, *Reflections on the Guillotine*, p. 230, in Albert Camus, *Resistance, Rebellion, and Death*, (trans: Justin O’Brien)(New York: Vintage Press, 1988). Renate Wohlwend noted that Camus’s phrase was quoted in some reports presented to the Parliamentary Assembly, and that some parliamentarians recited it in debates, see, Renate Wohlwend, *The Role of the Council of Europe’s Parliamentary Assembly*, p. 84, in Council of Europe, *Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

³³ *Position*, above, fn. 22, para. 1.

³⁴ *ibid*, para 49-50.

position appears to be misguided, because it relies upon the law being unalterable, when in fact the law changes to reflect evolving societal sentiment.

To fully understand how to situate the above observations within the Council's discourse, we must undertake a deeper jurisprudential enquiry on the relationship of law and the death penalty. Article 2(1) revealed that in Europe in 1949-50, the death penalty and rule of law were considered to be an important measure of sovereignty, which enabled the sovereign to be prepared for conflict. Foucault expressed the law and death penalty relationship as the law being "armed." He stated, "[l]aw cannot help but be armed, and its arm *par excellence* is death."³⁵ For Maurice Blanchot:

[t]he law reveals itself for what it is: less the command that has death as its sanction, than death itself wearing the face of the law...Death is always the horizon of the law: if you do this you will die. It kills whoever does not observe it.³⁶

Blanchot sought to describe death as a phenomenon of law, and even if the death penalty is suspended to its furthest *horizon* the condemnation remains. Peter Fitzpatrick has extended Blanchot's horizon, to attach it to positive law, as he argues "[d]eath is a horizon that cannot be gone beyond," because the "'truth' of positive law, then, is to be found in death."³⁷ In essence, what Fitzpatrick maintains

³⁵ Michel Foucault, *The Will to Knowledge: The History of Sexuality, vol 1* (trans: Robert Hurley) (Penguin, 1976), p. 144.

³⁶ Maurice Blanchot, *The Step Not Beyond*, (New York: SUNY Press, 1992) p. 24-25.

³⁷ Fitzpatrick, *Modernism*, p. 100. See also, Peter Fitzpatrick, *Death as the Horizon of the Law*, p. 21, in Desmond Manderson, (ed) *Courting Death: The Law of Morality*, (London: Pluto Press, 1999).

is that if death marks the ultimate event visited upon society and the state, nothing but the law must meet death at this ultimate limit, “[f]or law to rule, it has to be able to do anything, if not everything. It has to ensure that law is ever responsive to change, otherwise law will eventually cease to rule the situation which has changed around it.”³⁸

Fitzpatrick has described a further phenomenological component of law in that it possesses a transcendent quality as it is, “hovering ubiquitously over and incipiently occupying all finitudes, in its being ever able to ‘cut’ into, and render palpable, its own infinite possibility.”³⁹ According to Fitzpatrick, for law not to kill would be to deny the “infinite possibility” of law, and render defunct its ability to “cut” into prevailing or approaching vicissitudes. As a consequence he states, “any argument that law and capital punishment are incompatible must appear quixotic when confronted with those cogent claims that they are, rather, eminently suited.”⁴⁰

These philosophical positions point to the potentiality of law. Fitzpatrick views the phenomenon of law as a reaction to external pressures aimed at it, such as the catastrophic events of war. Law must curtail all threats to survive. It would ultimately depend upon the murder rate, or serious crime rate, and what European

³⁸ Peter Fitzpatrick, *Modernism and the Grounds of Law*, (Cambridge: Cambridge University Press, 2001), p. 71.

³⁹ *ibid*, p. 133.

⁴⁰ Peter Fitzpatrick, “*Always More to Do*”: *Capital Punishment and the (De)Composition of Law*, p. 118, in Austin Sarat (ed), *The Killing State: Capital Punishment in Law, Politics and Culture*, (New York: Oxford University Press, 1999).

society perceives as the maintenance of a peaceful, secure, equilibrium, for the law to mandate the death penalty or not.

However, this is not the whole story. It should also be argued that the law does *not* have to reach its potential to rule situations and promote legitimate governmental action. Austin Sarat, the American death penalty scholar, argued that law does not need to reach its threshold of death.⁴¹ The Council's discourse against the punishment would be in complete agreement. Indeed, the theory which is proposed above has been tested throughout the evolution of the Council's discourse against the punishment. Below are some practical examples of the attempted return of the death penalty within the Council and the Member States. It should be appreciated that the Council's anti-death penalty discourse has, so far, prevented municipal law reaching its deathly threshold.

In June 2007, the Parliamentary Assembly noted that Russia still had not ratified *Protocol No. 6*,⁴² and Chapter Six has argued that such refusal is an example of the difficulties within Central and Eastern Europe to expediently relinquish the punishment. *Protocol No. 13* has still not been signed by Azerbaijan and the

⁴¹ Austin Sarat, *When the State Kills: Capital Punishment and the American Condition*, (Princeton: Princeton University Press, 2001), p. 33.

⁴² Resolutions 1455 (2005), 1277 (2002) and 1187 (1999), in all of which the Parliamentary Assembly repeated appeals to the Russian authorities on the matter of the abolition of the death penalty, urging them to ratify immediately Protocol No. 6. The Assembly points out that the deadline initially set for honouring this commitment passed in 1999.

Russian Federation, and the protocol has not been ratified by Poland, and Spain.⁴³ Albania and Latvia have abolished the death penalty only for ordinary crimes, as they have retained the punishment for crimes with aggravating circumstances committed in wartime, and in the case of Albania during a state of emergency.⁴⁴

Furthermore, the Parliamentary Assembly was particularly unnerved by a French National Assembly debate, on 8 April 2004, for the reintroduction of the death penalty for terrorists.⁴⁵ This was a serious challenge to the current removal of the death penalty by a leading Council member, which is supposed to be fundamentally against the punishment. In challenging the French National Assembly “proposition de loi,” members of the Parliamentary Assembly issued a Written Declaration stating:

[a]bolition of the death penalty across Europe is one of the greatest achievements of the Council of Europe. Any move to reintroduce it would reverse this progress. Once one exception is admitted, the same hollow arguments can be rephrased with increased confidence in calling for further exceptions.⁴⁶

⁴³ Resolution 1560 (2007) *Promotion by Council of Europe member states of an international moratorium on the death penalty*, 26th June 2007, para. 13.

⁴⁴ *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, Doc. 10911, 21 April 2006, para. II (i) 8.

⁴⁵ See, *Recent initiative in France to reintroduce the death penalty for the perpetrators of terrorist acts*, Doc. 10211, 17 June 2004.

⁴⁶ Renate Wohlwend later stated, “On 8 April 2004, 48 members of the French National Assembly tabled a bill aimed at restoring the death penalty for terrorists. I personally reacted strongly to this

The possibility of the reintroduction of the death penalty was clearly a concern. A country such as France bringing the punishment back would have severely damaged the credibility of the human rights discourse. The French National Assembly did not pass the law to reintroduce the death penalty, but the motion did display a certain ambivalence towards the Council's absolutist position.

Some have argued that there is an underlying sentiment within Europe which calls for the reintroduction of the death penalty. They maintain that it is not European society which has endorsed this penological development, but European political elites. In the Council book on the death penalty published in 1999, three authors noted a possible political insensitivity in demanding new states swiftly abolish the death penalty.⁴⁷ Caroline Ravaud and Stephan Trechsel questioned whether the social and economic problems encountered in the swift transition to democracy in Central and Eastern Europe made it "premature and unrealistic to require them to abide by a rule which other European countries had taken decades to adopt."⁴⁸

idea, and many members of this Assembly joined me in publishing a declaration, (Doc 10211)," in *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty*, Doc. 10911, 21 April 2006, para. 14.

⁴⁷ See, Roger Hood, 'Introduction,' p. 12. Hood noted the contributions of Caroline Ravaud and Stefan Treschel, and Robert Fico, which questioned this expedient penological change, in Council of Europe, *The Death Penalty: Abolition in Europe*, (Strasbourg: Council of Europe Press, 1999).

⁴⁸ Caroline Ravaud and Stefan Trechsel, 'The death penalty and the case-law of the institutions of the European Convention of Human Rights,' p. 83, in, *ibid.*

Furthermore, Robert Fico argued that the quick route to abolition which Slovakia took did not provide sufficient debate on the punishment within the country.⁴⁹ It has been argued that the Council promotes a democratic deficit in that the citizens of Europe do not decide on appropriate government as the decisions are made centrally in a supra-national formulation.⁵⁰ Joshua Marshall has argued that abolition of the death penalty in Europe is not in response to public opinion but “in spite of it.”⁵¹

As an example, the Institute of Sociology of the National Academy of Sciences of Ukraine, in 1994, found that 67% of Ukrainians favoured the death penalty, while only 17% wanted gradual or immediate abolition.⁵² This public support appeared to remain constant as in 1995, 69% were in support of the punishment, and 16% called for abolition, and in 1996, 63% supported it and 18% wanted abolition. In a review of a Gallop Poll on Eastern Europe, Craig Smith has reported that a majority of Europeans would want the return of the death penalty but that “all of the politicians pronouncing their desire for a return of capital punishment admit” that the punishment will not return and that the statements are “nothing more than political

⁴⁹ Robert Fico, ‘The death penalty in Slovakia,’ pp. 117-130, 120-22, *ibid.*

⁵⁰ See, Laurence E. Rothenberg, *International Law, U.S. Sovereignty, and the Death Penalty*, *Geo. J. Int’l L.* vol. 35, No. 3 (2004) 547-595, at p. 556.

⁵¹ Joshua Micah Marshall, *Death in Venice: Europe’s Death-Penalty Elitism*, *The New Republic*, (July 31, 2000), pp. 12-13. In comparing Europe with the United States, Marshall argued, “Europe doesn’t have the death penalty because its political systems are less democratic, or at least more insulated from populist impulses, than in the U.S. government,” p. 13.

⁵² Cited in Serhiy Holovatiy, ‘Abolishing the death penalty in Ukraine – difficulties real or imagined?,’ p. 114-115, in Council of Europe, *The Death Penalty: Abolition in Europe* (Strasbourg: Council of Europe Publishing, 1999).

gamesmanship.”⁵³ Another example can be seen in the United Kingdom when an ICM survey in 2003⁵⁴ claimed that 62% wanted the return of the death penalty for child murderers, and 54% wanted the death penalty for all murderers.

However, such claimed public support has not thwarted the Parliamentary Assembly’s efforts to create and maintain abolition in Member States. Renate Wohlwend noted the success of the abolition program in Central and Eastern Europe after 1994:

[t]he method proved to be efficient, albeit sometimes a little bit difficult on countries caught up in a difficult process of democratic transition, with public opinions at times disoriented by the speed of political, legal and economic change. But in fact the results were there: no candidate country walked away from the effort, and in fact or in law, all dropped the death penalty. I already mentioned that Russia is unfortunately running behind schedule as regards definitive abolition, but I can assure you that the Assembly will not stop pushing until its commitment is fulfilled as well.⁵⁵

⁵³ Graig S. Smith, ‘Many in Eastern Europe support death penalty,’ *International Herald Tribune*, 20 November 2006, <http://www.int.com/articles2006/11/20/news/death.php>.

⁵⁴ It must be identified that the sample size was extremely small with only 1,012 people questioned by the ICM survey, see, Colin Brown and David Bamber, ‘Shadow Home Secretary: Bring back the death penalty,’ *Daily Telegraph*, 16 November 2003.

⁵⁵ Renate Wohlwend, ‘Full text of Speech delivered by Renate Wohlwend (Liechtenstein/EPP/CD) on the occasion of the 3rd World Congress against the Death Penalty,’ (Paris 1-3 February 2007).

Franklin Zimring supported Wohlwend's findings when he stated that "nowhere in Europe did the death penalty stay an important political issue for very long after abolition."⁵⁶ These positions argue that there is not to be a deficit at all, and William Schabas has argued that the issue of public opinion must be viewed through paradox. He maintains that the human rights advocates argue that it is democratic to abolish the death penalty, but that politicians argue that the punishment is the "will of the people."⁵⁷ Intrinsic to this paradox is the "myth" of public support as it does not manifest into specific political action to change the abolition legislation. Robert Jay Lifton and Greg Mitchell have argued that there is a "mythology of decisive, unyielding support" for the death penalty.⁵⁸ Roger Hood and William Schabas, among others, have identified that there are many problems associated with opinion polls on the death penalty, which *inter alia*, concern the timing of questionnaires (for instance following horrific and violent crimes) sample size, sample demographics, and the context and focus of questions asked.⁵⁹ As such the elevation

⁵⁶ Franklin E. Zimring, *The Contradictions of American Capital Punishment*, (New York: Oxford University Press, 2003), p. 23. The question of general public opinion with reference to evidence for the World Coalition Against the Death Penalty, and 'Cities Against the Death Penalty,' and the possible reinstating of the death penalty in Europe, is taken up in Chapter Seven.

⁵⁷ William A. Schabas, 'Public Opinion and the Death Penalty,' p. 309 in Peter Hodgkinson and William A. Schabas, (ed) *Capital Punishment: Strategies for Abolition*, (Cambridge: Cambridge University Press, 2004).

⁵⁸ This is an argument from the perspective of public support in the United States, but the same position can be used in the European context. See, Robert Jay Lifton and Greg Mitchell, *Who Owns Death: Capital Punishment, the American Condition and the End of Executions*, (New York: Perennial, 2002), p. 213.

⁵⁹ Roger Hood, *The Death Penalty: A Worldwide Perspective*, (Oxford: Oxford University Press, 2002), pp. 233-246; Schabas, above, fn. 57, pp. 331.

of the pedagogy of human rights over the acceptance of published opinion polls, has been advocated by the Council in its expansion strategy through Central and Eastern Europe. Furthermore, Schabas is in agreement with this policy and firmly argues:

[p]ublic opinion cannot be linked to democratic government in vulgar equation. If this were the case, international human rights and constitutions would be deemed anti-democratic. Courts, as well as legislators must be more aggressive in their role as moulders of public opinion, relying for guidance upon the values of dignity, equality, humane treatment that underpin international human rights norms.⁶⁰

In not accepting the arguments within Member States that any public outcry is a legitimate basis for the reintroduction of the death penalty, the Council is advocating this strong ideological position. The Parliamentary Assembly has legitimately demonstrated that it represents the “conscience of Europe”⁶¹ in promoting abolition, and the governmental signatures and ratifications of *Protocols No. 6* and *No. 13* is testimony to this fact.

⁶⁰ *ibid*, p. 330.

⁶¹ Wohlwend, above, fn. 55, stated that in promoting the abolition of the death penalty, “the Parliamentary Assembly has...successfully played its role as the Council of Europe’s conscience;” and Fátima Aburto Baselga, affirmed, that the Parliamentary Assembly “represents the conscience of Europe,” in *Promotion by Council of Europe member states of an international moratorium on the death penalty*, Doc. 11321, 25 June 2007, Political Affairs Committee, Rapporteur for Opinion: Mrs Fátima Aburto Baselga. Approved by the committee, 25 June 2007, para 1.

But hearts and consciences can change. Sigmund Freud reminded us that emotional shifts can occur especially when questions of life and death are confronted.⁶² Freud is useful here when he identified that “[c]onscience is the inner perception of the repudiation of a wishful impulse within us.”⁶³ In his leading work on social theory and punishment, David Garland has argued that “sensibilities and mentalities have major implications for the ways in which we punish offenders,”⁶⁴ and that societal “sensibilities” are a manifestation of a cognitive component of the state. If there are powerful enough sentiments which call for the death penalty, it may be re-imposed.

History has clearly demonstrated that there is an inherent impulse *within* to resort to the death penalty at the threshold of violent circumstances. At the 1980 debates on the death penalty within the Parliamentary Assembly, Mr. Mercier of France had stated in similar psychoanalytical diagnosis that “[d]eath...is ever present in the human mind, despite everything; which everywhere casts so many shadows, darkening the brilliant colours of the world.”⁶⁵ As such it should be remembered that this development of a European conscience which renounces the impulse is just in its neonatal stage: after 5 millennia, we have only had *de facto* abolition for around 10 years. The UN Human Rights Chamber, in the case of Sretko Damjanovic, identified that “at this particular moment of development the death

⁶² Sigmund Freud, *On Murder, Mourning and Melancholia*, (London: Penguin, 2005), pp. 167-194, 219-232.

⁶³ *ibid*, p. 70.

⁶⁴ David Garland, *Punishment and Modern Society: A Study in Social Theory*, (Oxford: Clarendon Press, 1990), p. 195. The philosopher Bertrand Russell made a similar observation on the prominence of “sentiment” in creating the legitimacy of law, in *Power* (London: Routledge, 2005), p. 25.

⁶⁵ Mr. Mercier of France, above, fn 8. p. 55.

penalty is regarded as an alien institution within the system of European democratic values.”⁶⁶ It is this particular moment that the punishment is considered to be repugnant towards European sentimentality and conscience.

The possibility that the Council itself could change its policy on the death penalty should be considered. From the arguments presented in Chapters Five, Six, and Seven, the friction between the Committee of Ministers and the Parliamentary Assembly is witnessed on a number of issues including the appropriate method for amending Article 2(1), the prerequisites for new membership of the Council, and the acceptable human rights standards of Observer States. The Parliamentary Assembly has most radically advanced human rights boundaries, but the Committee of Ministers has, on many occasions, acted as a buffer and has adopted a very cautious approach to the formulation of human rights provisions: one which appears to give deference to governmental issues. Renate Wohlwend poignantly explained:

I can assure you that it was not so easy for the Council of Europe to adopt Protocol No. 6 to the European Convention on Human Rights, which mandates the abolition of the death penalty in peacetime. After all, it is the governments of the member states which dominate the Council’s executive body, the Committee of Ministers, which has to approve all conventions and protocols opened for signature; and the Ministers, as a rule, strive to work by

⁶⁶ *Damjanović v. the Federation of Bosnia and Herzegovina*, Case No. CH/96/30, 5 September 1997,

Concurring opinion of Viktor Masenko-Mavi and Rona Aybay, para 3.

consensus, and their decisions are often limited to the lowest common denominator.⁶⁷

Another possible avenue for return would be if a Member State did not ratify either *Protocol No. 6* or *Protocol No. 13*, and it attempted to remedy the defects identified within the European Court of Human Rights' decisions on the punishment. As demonstrated in Chapters Five and Six, the Court has not held that the death penalty is either a *per se* violation of the right to life under Article 2(1), nor that the punishment is a *per se* violation of the prohibition against inhuman punishment in Article 3.

If a Member State was determined to impose the death penalty, it could attempt to dissect the jurisprudence of the Court and then rectify all of the violations recorded within the Article 3 case-law: for example, ensuring that the defendant receives a fair trial, constructing adequate death row conditions, providing appropriate appeals and administering executions within a certain period of time.

If a Member State could implement such a capital judicial process (and this is certainly bordering on an impossibility) and claim that a wartime circumstance exists, then it may be able to impose the punishment. This is an extreme theoretical example, but one way in which the Council could remedy this possible anomaly, would be to specifically amend Article 2(1) to delete the textual availability of the punishment. If Article 2(1) merely stated "Everyone's right to life shall be protected," that would nullify any possible loophole within the *Convention* itself.

⁶⁷ Wohlwend, above, fn. 55.

Chapter Five discussed the textual failings of *Protocol No. 13* in not amending *Convention Article 2(1)*, and the role of the Committee was seen as significant for this legislative deficiency. So the question should be proposed as to whether the Committee of Ministers would allow the return of the death penalty if the Member States wanted it? The arguments presented within this thesis demonstrate that firstly, the Member States wanting the return of the death penalty is more a political theory rather than a serious normative proposition, and as a result, the Committee changing its stance on the death penalty is extremely unlikely.

However, these theoretical questions do point to exceptional circumstances where a miniscule possibility remains. Hence, the final section of this conclusion investigates how to ensure that the punishment does not return in the future within Member States and the Council organs.

8.4 Maintaining the Death Penalty-Free Zone

Niccolò Machiavelli offered his advice to the Magnificent Lorenzo, Son of Piero De' Medici, upon the Medici's return to power in Florence in 1513, and concerning the Prince's application of the death penalty, he stated, "reasons for taking life are not easily found, and are more readily exhausted."⁶⁸ Machiavelli was uncomfortable

⁶⁸ Niccolò Machiavelli, *The Prince*, (trans: C.E. Detmold) (Ware: Wordsworth Editions Limited, 1997), p. 65. Machiavelli also stated that if Lorenzo should "be obliged to inflict capital punishment

with the administration of the punishment and warned against its application. Michel Foucault similarly argued, “the authority that exercises the right to punish should always be uneasy about that strange power and never feel too sure about itself.”⁶⁹

Within both these statements there is an inherent understanding that the anti-death penalty advice to governments must be a continual one: at least an affirmation each time a new leader comes into power. The removal of the death penalty within Council Member States should be viewed as a *never-ending story*. It is a story which needs to be repeated to each generation.

In 1969, Louis Blom-Cooper opened his edited collection, *The Hanging Question*, by stating, “[p]robably more words have been uttered – in public and in private – over the issue of capital punishment than over any other single issue of public or social policy...Yet the debate rages on.”⁷⁰ The debate is still raging in Europe, and the interview of a capital lawyer in the United States by the death penalty scholar, Austin Sarat, is poignant when the lawyer stated, “[i]t doesn’t matter if you live from now until eternity, there will always be more to do.”⁷¹ The debates over the

upon any one, then be sure to do so only when there is manifest cause and proper justification for it,”
ibid.

⁶⁹ Michel Foucault, *Against Replacement Penalties*, p. 461, in, Michel Foucault, *Power: Essential Works of Foucault, 1954-1984*, vol. 3, (ed. James D. Faubion) (London: Penguin, 1994).

⁷⁰ Louis Blom-Cooper, *The Hanging Question: Essays on the Death Penalty*, (London: Duckworth Press, 1969), p. 1.

⁷¹ Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, *Harv. C. R.-C. L. L. Rev.* 31 (1996), p. 353.

death penalty will always be with us, and so for the punishment to be continually suspended, there needs to be a continual educative strategy.

Aleksandras Dobryninas stated that although Lithuania had abolished the punishment, “nevertheless it would be a mistake to abandon continued public education on death penalty matters...Lithuanian governmental and non-governmental institutions need to continue to develop educational strategies in support of abolitionist policy.”⁷² Thomas Hammarberg, the Commissioner for Human Rights is in agreement, when he stated “[h]erein lies a challenge for us abolitionists: we need to inform and educate about the true nature of this punishment. On this issue, too many politicians have failed to take a leadership role.”⁷³ Michael Mansfield QC, an English trial lawyer, during an address at a conference on the death penalty at Warwick University in 2004, stated:

there is a great need to ensure that we recognise that the job is, and always will be, education. There is a need to ensure that the British public regularly understand the arguments so that the threat is diminished. The threat of the return of capital punishment is diminished...If the public did understand

⁷² Aleksandras Dobryninas, ‘The Experience of Lithuania’s Journey to Abolition,’ p. 252 in Peter Hodgkinson and William A. Schabas, (eds) *Capital Punishment: Strategies for Abolition* (Cambridge: Cambridge University Press, 2004).

⁷³ Thomas Hammarberg, *We need to educate about the true nature of the death penalty*, presentation by the Commissioner for Human Rights at the III World Congress Against the Death Penalty, Paris, 1 February 2007, CommDH/Speech(2007)1.

properly what the debate was then one can be safe in the assurance that its return would be limited.⁷⁴

A moratorium on the death penalty was initiated in England in 1965, and it was officially removed from criminal legislation for ordinary offences in 1969. Yet 45 years following removal, Mansfield still iterated the need for education against the death penalty in England. He recognised that there “always will be” the need for education against the death penalty. Hence the ever-present possibility of the return of the death penalty needs to be rebutted. This intricate role of education to keep the punishment suspended was also observed by Eric Prokosh, the Amnesty International expert on the death penalty, when he stated:

the battle has to be fought over and over again. Each country has to go through a process that is often long and painful, examining for itself the arguments for and against, before finally, we hope, rejecting the death penalty...Even after abolition, there may be calls to bring the death penalty back. If the calls are serious enough, the arguments have to be gone through again.⁷⁵

To ensure that the death penalty remains in abeyance is to engage in a never ending battle, a battle which must be “fought over and over again.” On *Convention* Article 2 litigation, Douwe Korff, the European human rights expert stated “[w]e need to be

⁷⁴ Michael Mansfield QC, ‘Keynote address: Is the Death Penalty About to Execute Itself?’

University of Warwick conference, School of Law, 28th February 2004.

⁷⁵ Eric Prokosch, *The Death Penalty verses Human Rights*, p. 33, in Council of Europe, *Death Penalty: Beyond Abolition*, (Strasbourg: Council of Europe Publishing, 2004).

prepared to battle on for many years, McCann was a spring plank.”⁷⁶ Korff was an advocate for the applicant in *McCann v. the United Kingdom*, when the European Court of Human Rights described the *Convention* as a “living instrument.”⁷⁷

The interpretation can change over time and this would include the possibility of oscillation from acceptance of the death penalty, to rejection, to re-acceptance. As such, I am in agreement with Bill Bowring who maintains that human rights should be viewed as “the product of, and constantly reanimated by, human struggle.”⁷⁸ Indeed, the struggle against the death penalty needs to be “reanimated” to place the abolitionist agenda against the ever evolving changes of state politics.

At the moment the majority of the European Court of Human Rights jurisprudence reflects a severe restriction of the death penalty, but if political circumstances change in Europe, as described by Judge Garlicki above, the interpretation may change. Chapters Five and Six demonstrated that the Court has left the door ajar for the death penalty. It is a slim opening but it is still there.

One of the most pressing examples today which challenges the maintenance of the abolition of the death penalty is terrorist violence. Terrorism poses one of the main threats to world peace and thus to peace in Europe. Even with the success in that

⁷⁶ Douwe Korff, stated this at his book launch of the, ‘The Right to Life: A guide to the implementation of Article 2 of the European Convention on Human Rights,’ (Council of Europe Publications), London Metropolitan University, 5th July, 2007.

⁷⁷ *McCann et al, v. United Kingdom*, (17/1994/464/545), 27 September 1995, para. 146.

⁷⁸ Bill Bowring, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics*, (Abington: Routledge-Cavendish, 2008), p. 112.

France did not reintroduce the death penalty for terrorist crimes, and in Russia, Nur-Pashi Kulayev received a life sentence for his role in the Beslan tragedy, the Council of Europe is still concerned at the possibility of the return of the punishment for terrorist offences. In June 2007, Fátima Aburto Baselga, the *rapporteur* for the Political Affairs Committee, stated in a Parliamentary Assembly Opinion:

I am afraid that there is a real risk that in our times, in the context of the fight against terrorism, our societies lose sight of their principles and values and take steps backwards, driven by fear...The fact that society is not prepared to relinquish the death penalty is often invoked as an argument against its abolishment, and it is true that in this matter there is often a gap between the electorate on the one hand, and parliaments and governments on the other.⁷⁹

Central to Baselga's concern is the effect of terrorism on European society and the arousing of public support for the death penalty. Under the heading, "Some major concerns," she also stated that, "[t]he risk that in the context created by the fight against terrorism, the recourse to the death penalty is considered 'more acceptable.'"⁸⁰ One of the fundamental features of the Council's discourse must be the education of all European peoples, not just the elite. Following Michael Mansfield and Thomas Hammarberg's observation, if all Europeans are educated on

⁷⁹ *Promotion by Council of Europe member states of an international moratorium on the death penalty*, Parliamentary Assembly, Doc. 11321, 25 June 2007, Part B, paras 9-10.

⁸⁰ *ibid.*

the fallacies of the death penalty then its return, even for terrorist offences, would be diminished.

The Beslan trial pointed the way forward in maintaining that the death penalty is illegitimate in terrorism cases. It was an educative decision on how European sentimentality is evolving to protect life even after terrorist violence. Robert Badinter promoted this policy when he stated:

[i]n reality, no one is denying the threat posed by terrorism, but not only does the war against terrorism not require the death penalty, it must actually ensure that it does not resort to it. In the face of terrorism, abolition gives democracy an ethical dimension, essential in such a war. The terrorist kills innocent victims in the name of his ideology; democracy defends freedom and recognises all lives as sacred, even that of the terrorist. The conflict is one of values in which, eventually, democracy always triumphs and even more so when it upholds, loud and clear, the principles on which it is founded. Faced with crime and cruelty, a democracy's justice system rejects vengeance and death. It punishes but it does not kill; it prevents the terrorist from harming others but respects his life; by refusing to give him death, democracy guarantees the humanity the terrorist denies through his crimes. Democracy comes out as the moral victor of the test inflicted on it by terrorism. That will not be the least of its victories in the eyes of generations to come.⁸¹

⁸¹ Robert Badinter, 'The OSCE and the Death Penalty', in *The Death Penalty in the OSCE Area*, (Warsaw: OSCE Office for Democratic Institutions and Human Rights, 2006), p. 8.

The promotion of life through democracy is being reaffirmed in the face of terrorist violence.⁸² It is a returning to the sentiments of M. Francois Guizot, the Eighteenth Century European historian, who observed, “[p]unishments may destroy men, but they can neither change the interests nor sentiments of the people.”⁸³ An understanding that the death penalty will not change future terrorist’s minds, is the approach which Badinter argued Europe must continue to endorse. As Guizot had further argued that the death penalty:

may kill one or several individuals, and severely chastise one or several conspiracies; but if it can do no more than this, it will find the same perils and the same enemies always before it. If it is able to do more, let it dispense with killing, for it has no more need of it: less terrible remedies will suffice.⁸⁴

What the evolution of arguments for better ways to punish terrorists must encompass is that there are other punishment options. The battle ground is that when a Council Member State does claim that its security is threatened to argue

⁸² Jonathan Glover has made similar observations when he stated, “Danger to life does not deter people from fighting wars, and a terrorist gunman may be just as committed to his cause as a soldier. And executions create martyrs, which help the terrorist cause,” *Causing Death and Saving Lives*, (London: Penguin, 1977), p. 241.

⁸³ M.F. Guizot, *A Treatise on Death Punishments*, p. 327, included in, M.F. Guizot, *General History of Civilisation in Europe: From the Fall of the Roman Empire Till the French Revolution*, (Edinburgh: William and Robert Chambers Press, 1848). Mr. Preces-Barba of Spain similarly argued in the Parliamentary Assembly that “it is impossible to destroy ideologies by executions,” above, fn. 8, p. 62.

⁸⁴ *ibid.*

that, firstly, why such threat is not a challenge to the very *life of the state*. Even by 1980, arguments were being put in the Parliamentary Assembly by Mr. Lanner of Austria, that he did not believe “that in free societies there are crimes against the state which could justify the taking of life by the state itself.”⁸⁵

Secondly, to argue why the imposition of executions would have future detrimental effects; for example, all of the arguments presented in Chapter Three, including the inevitability that innocent people will be executed, that the punishment does not possess a special deterrent value, that the punishment brutalizes society, and the need to renounce the punishment as a form of retribution. Thirdly, that as a consequence of the first two arguments, the death penalty is not necessary and thus an illegitimate practice of modern government for the preservation of the life the state. Indeed, Mr. Flanagan of Ireland argued in the 1980 Parliamentary Assembly debates on the death penalty that the respect for human rights necessarily “accepts certain essential limits on the power of the state to coerce or to condemn.”⁸⁶

Furthermore, the argument can be placed within a deeper phenomenological horizon of political philosophy, in that if the questions by the government *are actually being put forward* then there will *never* be room for the death penalty. The existence of the possibility of the *question* renders the death penalty illegitimate. From the question should emanate the Derridean response that, “I can only say I prefer life,”⁸⁷

⁸⁵ Mr. Lanner of Austria, above, fn. 8, p. 73.

⁸⁶ *ibid*, Mr. Flanagan of Ireland, p. 56.

⁸⁷ S. Crosara, “I’m Against the Death Penalty,” University of Trieste, 9 November 2000, <http://www.triestecontemporanea.it/pag20-e.htm>. Mr. Calice of Italy made a similar argument in the Parliamentary Assembly in 1980 when he stated: “our European civilisation, our world, must work to

and as we are alive, *we prefer to begin with the promotion of life*. The death penalty is antithetical to this aim of humanism and human rights.

This Council is promoting “life” both regionally and internationally. Apart from its relationship with the EU and the OSCE mentioned above, it has strong relationships with anti-death penalty non-governmental organisations including Hands Off Cain, Amnesty International, and the World Coalition Against the Death Penalty. It also has connections with death penalty information centres such as the Centre for Capital Punishment Studies, based at the University of Westminster in London, and the Death Penalty Information Center, in Washington DC.

Furthermore, the Council renounced the execution of Saddam Hussein. In a Committee of Ministers press statement, the Chairman of the Committee of Ministers, Fiorenzo Stolfi, deplored the execution of the former Iraqi leader, when he stated:

[t]he Council of Europe is opposed to the death penalty in all its forms...Saddam Hussein should have paid differently for the terrible crimes for which he was convicted according to the law of his country. Capital punishment cannot repair the horror of the past.⁸⁸

During the search for Osama Bin Ladin, Renate Wohlwend stated in the opening sessions of the Conference in Springfield, Illinois, in 2003, that “if any Council of

establish closer relations with life and not to become a messenger and harbinger of death,” *ibid*, p.

71.

⁸⁸ *Execution of Saddam Hussein*, Press Release, Strasbourg, 30.12.2006, Decl-30.12.2006e.

Europe member state arrested Osama Bin Laden, for example, it would not be able to extradite him to the United States unless it was given assurances that the death penalty would not be sought.”⁸⁹ Such an uncompromising global view on the death penalty, will inevitably lead to other countries renouncing the punishment, and this will create a global consensus. This in turn will strengthen the Council’s regional discourse, as it will be seen not as a unique feature within the international picture, but instead reflective of a global abolitionist norm.

8.5 Conclusion

This thesis has outlined a legal history and has engaged with the political processes which contributed to the Council becoming a *de facto* death penalty-free zone.⁹⁰ It has revealed the significant contribution made by the Parliamentary Assembly and the Committee of Ministers in evolving the Council’s human rights discourse, and also the *Convention* jurisprudence of the former European Commission of Human Rights, and the current European Court of Human Rights.

There has been examples of ambivalence within the different organs on various aspects of the promotion of the anti-death penalty position. These include

⁸⁹ *European Parliamentarians to Engage US Congressmen and Senators in Debate over Death Penalty*, Press Release, 4.4.2003; *An Assembly Conference on the Death Penalty Opens in Springfield*, Press Release April 2003.

⁹⁰ *Promotion by Council of Europe Member States of an international moratorium on the death penalty*, Doc. 11303, 11 June 2007, Report, Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Pietro Marcenaro, adopted on 8 June 2007, p. 1.

identifying the appropriate mechanisms for amending Article 2(1), the threshold of Article 3 and the standards expected of the United States and Japan as observer states. Furthermore, this research has identified that there are theoretical arguments which point to potential dangers of the position of Member States. It is seen that they have the power to undermine the created death penalty-free zone. However, it is conceded that the governments do not currently intend to reintroduce the punishment and, it is only a theoretical possibility.

Consequently, this research proposes that an effective way to combat the possibility of the return of the punishment is not to view the death penalty-free zone as a *once-abolished-always-abolished* position, but one which necessitates the renunciation of the punishment as a continual human rights project. The abolition of the death penalty in the Council must be viewed as the telling of a *never-ending story*. If the story of the repugnant vicissitudes of the punishment are reminded to each generation the Committee of Ministers claims of the “irreversible trend towards universal abolition,”⁹¹ will be realised, both inside and outside the Council’s borders. This work is a contribution to the need for continued education on the punishment. It is appropriate to conclude with the words of Hans Göran Franck:

⁹¹ *Position of the Parliamentary Assembly as regards the Council of Europe member and observer states which have not abolished the death penalty, Parliamentary Assembly Recommendation 1760 (2006)*, Reply adopted by the Committee of Ministers on 31 January 2007, at the 985th meeting of the Ministers’ Deputies, CM/AS(2007)Rec1760 final, 2 February 2007, para 2.

the death penalty must be abolished because it is inhuman and thus incompatible with our system of values...Capital punishment must come to be regarded in the same way as any other cruel, inhuman or degrading treatment and punishment for the world to become a better place where mankind can live in peace and prosperity; this means the death penalty has to be abolished for all offences, be they peace-time or war-time offences, as soon as possible – worldwide.⁹²

⁹² *Report on the abolition of capital punishment*, Doc. 7154, 15 September 1994.

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